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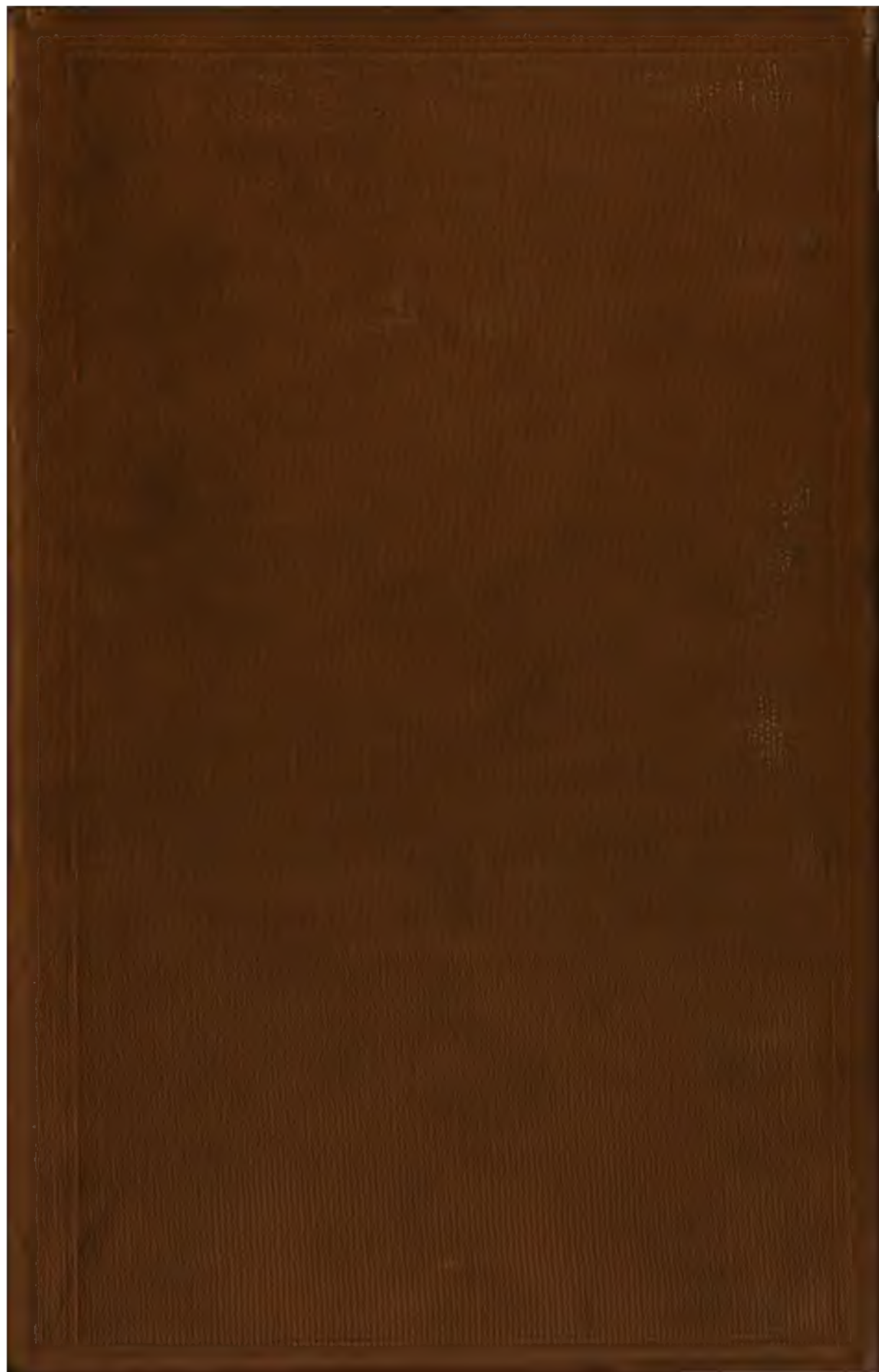
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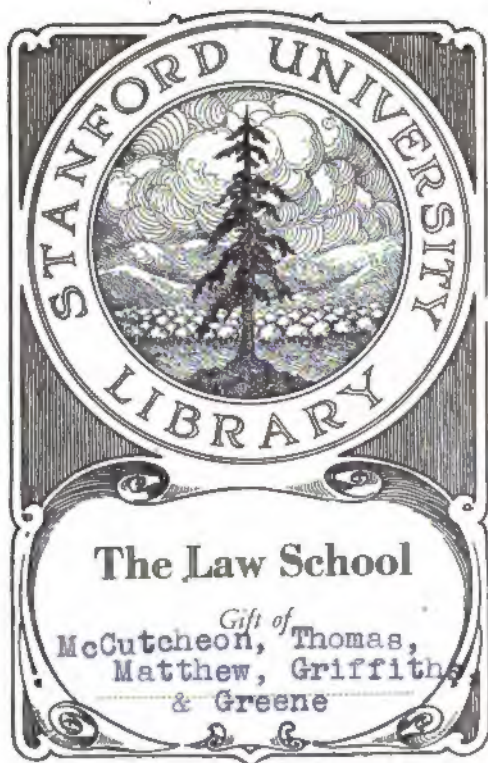
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A TREATISE  
ON THE LAW OF  
PERSONAL INJURIES

INCLUDING  
EMPLOYER'S LIABILITY, MASTER AND SERVANT  
AND THE WORKMEN'S COMPEN-  
SATION ACTS

By HON. W. F. BAILEY  
OF THE WISCONSIN BAR

*SECOND EDITION*

THREE VOLUMES

VOLUME III

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# MASTER AND SERVANT.

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## I. GENERAL CONSIDERATIONS.

### § 738. Scope of chapter and introductory.

In this chapter it is intended to consider (1) when a servant may be said to be acting outside the scope of his employment; (2) the effect of voluntarily acting outside; and (3) the effect of so acting pursuant to orders. The question of fellow-servants has been considered in preceding chapters relating thereto. Where a servant is injured and sues his employer therefor, the defense is often set up that the servant was acting outside the scope of his duties at the time of his injury. Whether a recovery is precluded because of such fact depends primarily on whether the servant was voluntarily outside the scope of his duties or whether he was so acting pursuant to a command of the master or his representative. If the former, the servant cannot recover. If the latter, there are several matters to be considered, such as whether the command, if given by another servant, was within the authority of such other servant; and the effect of the

command and obedience thereto on the defenses of assumed risk and contributory negligence, etc.

Questions relating to scope of employment occur very frequently where a third person attempts to hold a master liable for the acts of his servant, the rule being that an act done by a servant while engaged in his master's work, but not done as a means of or for the purpose of performing that work, is not to be deemed the act of the master, and a person who is injured by such act, even if a negligent one, cannot recover damages of the master therefor.<sup>48</sup>

The foregoing doctrine is sustained in many cases.<sup>49</sup>

**§ 739. Liability where offending servant (not injured servant) acts outside scope of employment.**

It will be noticed hereafter, in this chapter, that the rule is that a servant acts outside the scope of his employment so as to bar a recovery, where pursuant to the orders of another servant who had no authority to give the order.<sup>50</sup>

Another phase of the question presents itself where the injured servant is acting within the scope of his employment but the offending servant is acting outside the scope of his employment. In such a case, it seems that the master is not liable, the rule being the same as if the action was brought by a third person not a servant,<sup>51</sup> provided the two servants are not fellow-servants.

48. This was said where a boy in defendant's employ, in leading a colt to water, invited a small boy to ride the colt, who was injured. *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 489, 44 Am. St. Rep. 359.

49. *Howe v. Newmarch*, 12 Allen 49; *Hawks v. Charlemont*, 107 Mass. 414; *Hawes v. Knowles*, 114 Mass. 518; *Levi v. Brooks*, 121 Mass. 501; *George v. Gobey*, 128 Mass. 289; *Wallace v. Merrimac, R. N. & E. Co.*, 134 Mass. 95; *Walton v. New York, C. S. Co.*,

139 Mass. 556; *Young v. South Boston Ice Co.*, 150 Mass. 527; *Mitchell v. Crossweller*, 13 C. B. 237; *Croft v. Allison*, 4 B. & Ald. 590; *Limpus v. London Genl. Omnibus Co.*, 1 H. & C. 526; *Borwick v. Eng. Joint Stock Bank L. R.*, 2 Ex. 259; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Morier v. St. P. M. & M. R. Co.*, 31 Minn. 351, 17 N. W. 952; *Davis v. Houghtellin*, 33 Neb. 582.

50. See *infra*, § 755.

51. If a foreman employed by a corporation has authority to em-

While acting without authority of his employer and beyond the scope of his employment, the servant is a stranger and a mere volunteer, and hence where an injury is caused to an employee by the negligence of another employee, while acting as a mere volunteer outside the scope of his employment, the master is not liable, as where one without authority ran a repair car on the track which collided with a regular car, injuring the motorman.<sup>52</sup>

But where the master has acquiesced in employees voluntarily performing service outside of their regular work, such service may be considered within the scope of their employment to the extent that the master will be liable for their negligent acts while so engaged, resulting in injury to a servant.<sup>53</sup>

## II. WHEN SERVANT ACTING WITHOUT SCOPE OF DUTIES.

### § 740. General rule.

The scope of the employment is defined by what the servant was employed to perform and what, with the knowledge and approval of the employer, he actually did perform, rather than by the mere verbal designation of his position.<sup>54</sup>

ploy and discharge servants, it is within the scope of his authority to use reasonable force to remove a discharged workman from the shop, and the corporation will be liable if he uses excessive force for that purpose. *Rogahn v. Moore Mfg. Co.*, 79 Wis. 573.

52. *Moran v. Rockland R. & C. St. R. Co.*, 99 Me. 127, 58 Atl. 676.

53. *Big Five Tunnel, O. R. & T. Co. v. Johnson*, 44 Colo. 236, 99 Pac. 63.

54. *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355. Where an employee was injured while working with a steam hammer, and it was

urged that the work that he was doing at the time was without the scope of his employment, the plaintiff having testified that he was employed to wheel scrap iron from the yard into the shop where the hammer was, and to fill the tanks with water and bring ice, and that the first time that he had worked at the hammer was the morning of the accident, and his immediate superior having testified that when first employed by the company he was liable to be put to do anything he was called upon to do in or about the shop, it was said: "However this may be, it appears from his own testimony that he had



Work similar to that ordinarily performed by a servant, especially where done on one or more former occasions, is not necessarily outside the scope of the employment.<sup>55</sup>

**§ 741. Incidental acts.**

An act may be said to be within the scope of a servant's employment when, although it is unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do, that it may be said to be a mode, though improper, of performing the act authorized; as, for instance, where persons were employed to unload freight at a particular point from a boat, and while waiting at the clerk's desk for their pay, the boat was loosed from its moorings and they were forced to act as seamen until they escaped.<sup>56</sup>

This is perhaps an extreme case, and relates to the scope of authority of the directing servant. It illustrates, however, the question of incidental acts whether on the part of the directing servant or voluntary acts of the servant.

A night watchman whose principal duty is to prevent pilfering by thieves acts in the line of his duty where he is injured in attempting to close a defective door.<sup>57</sup>

been at work there for two months; made no objection when called upon to work at the hammer, and voluntarily undertook that employment. It was held that no ground was presented for recovery. *Hanrathy v. Northern Central R. Co.*, 46 Md. 280. Where an employee whose duties were to trim lamps on an electric tower was injured by the fall of the elevator, and it appeared that another employee had told him as he was about to ascend that the lights had already been trimmed, but that the overseer directed him to go, notwithstanding such information, it was said that it made no differ-

ence whether such lamps had been trimmed that day or not. The foreman had the right to see that the work was done properly, and to direct that they be trimmed again, and it was the duty of the plaintiff to obey. *Weiden v. Brush Electric Light Co.*, 73 Mich. 268, 41 N. W. 269.

55. See *Findlay v. Russel Wheel & Foundry Co.*, 108 Mich. 286, 66 N. W. 50; *Butler v. Chicago, B. & Q. R. Co.*, 87 Ia. 206, 54 N. W. 208.

56. *The State of Missouri*, 76 Fed. 376.

57. *Upton v. Bartlett*, 59 Hun (N. Y.) 619, 13 N. Y. Supp. 451.

An oiler, sweeper and grinder in a cement factory, whose testimony showed that he was expected to do whatever he was directed to do about the place, was not without the scope of his employment when ordered to open a cock in an air pipe with a wrench, a duty he had performed before and with which he was familiar.<sup>58</sup>

So where plaintiff was employed to do general work in an elevator, and he alleged that he was bound to obey orders in respect to that work, he cannot be heard to claim that he was only employed to work at the hoppers in unloading cars, and that it was no part of his work to assist in fastening vessels to a pier.<sup>59</sup>

Other illustrations are given in the notes below.<sup>60</sup>

58. *Swick v. Aetna Portland Cement Co.*, 147 Mich. 454, 111 N. W. 110.

59. *Baltimore Elevator Co. v. Neal*, 65 Md. 439, 5 Atl. 338.

60. **ELEVATOR BOY REMOVING OBSTRUCTION TO ELEVATOR.** An elevator boy was not without the scope of his employment in going to the upper story to see what was the cause of the elevator being stuck, and in attempting to remove the obstruction. The elevator fell to the bottom, the rope having become uncoiled. His ordinary duties only carried him to the third floor and by his inattention the elevator went beyond that floor. *Stone v. Boscawen Mills*, 71 N. Hamp. 288, 52 Atl. 119.

**ERRAND BOY SENT TO DIP ACID MIXTURE FROM CROCK.** It being part of the duties of a minor employee to do errands, his regular duties at first being a "scratcher on silver" in a jewelry factory, and later to operate a footpress, it could not be said he was acting outside of his employment when sent into the yard to dip a portion of an acid

mixture from a crock. He was injured in such attempt by the pitcher which had no handle slipping from his hand spilling the mixture, some of which splashed into his eyes. *Hodde v. Attleboro Mfg. Co.*, 192 Mass. 237, 79 N. E. 252.

**EMPLOYEE IN PACKING DEPARTMENT OF MILL CALLED TO START IT AND OIL MACHINERY.** A servant who has worked in the packing department of a flouring mill and had charge of the machinery of such department, and occasionally called to assist in the mill proper, is not taken from his employment and set at a more hazardous employment by being called to help start the mill and oil its machinery. *Hathaway v. Washington Milling Co.*, 139 Mich. 708, 103 N. W. 164.

**EMPLOYEE IN RAILROAD SHOP CALLED TO ASSIST IN RAISING CAR IN YARD.** An employee in the wood working department of a railroad shop, who had occasionally been called out of the shop to assist in clearing wrecks and to repair cars, was not called out of his regular

### Conductor.

A conductor was within the scope of his employment, where informed by the road superintendent that two culverts might be in a dangerous condition, where he caused the engine to be detached from his train and with the engineer and other employees started to examine

employment when instructed to assist in raising a loaded car in the yard for the purpose of repairs. *McClure v. Detroit Southern R. Co.*, 146 Mich. 457, 109 N. W. 847.

**EMPLOYEE STRINGING WIRE FOR ELECTRIC CALL BELL.** An employee directed to string a wire for an electric call bell from a machine shop to a point outside, who has assisted in wiring the building for electric lights, and whose duty it is, among other things, to look after wires in lamps, cannot be said, in stringing the call bell wire, to be acting without the scope of his employment. *Davis v. Port Huron, E. & T. Co.*, 126 Mich. 429, 85 N. W. 1125.

**EMPLOYEE IN PACKING HOUSE DRIVING HOGS UP CHUTE.** Where a boy fourteen years of age was called from his regular work in a packing house (what his duties were the case does not disclose) to assist in driving hogs up a chute, being furnished with a whip lash, the ordinary implement for such purpose, and he was killed by the whip lash, which was fastened about his wrist, being caught on a revolving shaft of which he had no knowledge, it seems that it must have been held that the act was either within or incidental to his employment, though such question is not referred to, it being held the risk was not assumed. *Calloway v. Agar Packing Co.*, 129 Ia. 1, 104 N. W. 721.

**EMPLOYEE USING OLD INSTEAD OF NEW PLATFORM.** Where the master had furnished a safe platform from which to oil machinery, but the plank which theretofore had been used for such purpose was, notwithstanding the new appliances, sometimes used for such purpose by employees, and was safe if properly nailed down, and an employee, in stepping upon the same, was thrown and injured by reason of one end being loose, the question of the master's negligence and of the scope of employment of the plaintiff, were questions for the jury. *Namyst v. Batz*, 85 Minn. 366, 88 N. W. 991.

**EMPLOYEE DIRECTED TO LOOK AFTER CERTAIN BELTS.** Where a servant employed by the day to perform certain work, was directed by his foreman to look after certain belts located near his place of work, and was injured by the breaking of one of the belts, it was held that he was, when injured, within the scope of his employment, and not a volunteer. *Mathew v. Kerlin*, 122 La. 606, 48 So. 123.

**EMPLOYEE USUAL DUTIES SECURING STERN LINE, DIRECTED TO SECURE BOW LINE ON VESSEL.** Where a cook upon a tug, though only nineteen years of age, but an experienced hand, was ordered by the owner and master of the tug to secure the line upon the bow of the boat, which was more dangerous

them, and was killed by the giving away of a trestle between the two, as to which he had not been informed there was any danger. The act was one necessary to the safety of his train.<sup>61</sup>

It was held that the duties of a freight conductor include, in case of an emergency, the coupling of cars.<sup>62</sup>

than securing it to the stern in the fact only that the strain was greater, and his usual duties included the securing of the stern line, though it was part of his duties to work on the deck generally, it was held that the master had a right to send him to the bow line, and that any dangers necessarily and universally incident to handling it were within the risks which plaintiff assumed. *Williams v. Churchill*, 137 Mass. 243, 50 Am. Rep. 304.

**EMPLOYEE ON TRACK GENERALLY.** Where a person is employed to labor on the track of a railroad company, generally, it will be presumed that it shall be at any place the company shall designate within a reasonable distance from the place of employment, and the company should not for that reason be liable for an injury received while at work at a place different from that at which he had been accustomed to work. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341.

**EMPLOYEE IN SHIPPING DEPARTMENT OF FACTORY SAWING CRATE MATERIAL.** An employee in the shipping department, was held to be within the scope of his employment where he engaged in sawing crate material, and was injured from contact with a revolving shaft. He had been operating such saw for several days and without

complaint. *Hertel v. Safety Folding Bed Co.*, 149 Mich. 223, 114 N. W. 712.

**FIREMAN UNCOUPLING CARS.** Where a fireman in the employ of the defendant was killed while attempting to uncouple cars, and the cause of death was alleged to be an insufficient number of servants, and the only proof of his being ordered to do such work was that of the engineer, who sometimes acted as conductor, to the effect that on some occasions he had directed him to uncouple cars, but could not recollect as to the time in question, it was said that unless the evidence shows that he was ordered to leave his place as fireman and engaged in the other more dangerous work of uncoupling cars, the question whether a sufficient number of hands were present is not material; and having failed to show this, there can be no recovery, since the injuries could not have happened if he had continued to perform his duties as fireman and not gone into a place of danger not within the scope of his employment. *Shugart's Admx. v. Norfolk & W. R. Co.*, 22 S. E. (Va.) 484.

61. *Terre Haute & I. R. Co. v. Fowler*, 154 Ind. 682, 56 N. E. 228.

62. *Deley v. Southern Pac. R. Co.*, 6 Utah 319, 23 Pac. 751.

**§ 742. Servant not actually at work.**

This particular branch of the subject has been considered in a former volume as to whether the injured person was at such time a servant. It was so considered under that head for the reason that the courts so classified it. In other cases the question of the master's liability is made to depend upon whether at such time the servant was within or without the scope of his employment, evidently being considered an employee. For these reasons the latter class of cases are considered under this particular subject.

The rule is that where an employee is injured when in a place he has no right to be, or leaves his employment temporarily for some private purpose, and not his master's business, he is not within the line of his duty at such time and if injury comes to him, he cannot charge the master with responsibility. Thus, a miner who leaves his place of work and goes into another place in the mine to get some tools he had loaned to another employee, and is injured by falling slate, cannot recover.<sup>63</sup>

So where he goes to a different place in the mine from that where his regular duties require, for the purpose of visiting the occupants there, and is injured by the giving way of the roof, caused by age and the insufficiency of props;<sup>64</sup> and it is immaterial that it was the custom of miners to visit their fellow-workmen, and that the employer acquiesced in such custom.<sup>65</sup>

But a fireman injured by the bursting of a hot water tank near which he was washing his overalls and jumper was held to be acting in the scope of his employment when injured.<sup>66</sup>

63. *Pioneer Min. Co. v. Talley*, 152 Ala. 162, 43 So. 800, 12 L. R. A. 61, n. s.

64. *Wright v. Rawson*, 52 Ia. 329, 3 N. W. 106, 35 Am. Rep. 275; *Ellsworth v. Menthany*, 104 Fed.

119, 51 L. R. A. 389; same case, 110 Fed. 119.

65. *Wright v. Rawson*, 52 Ia. 329, 3 N. W. 106, 35 Am. Rep. 275.

66. *Muller v. Oakes Mfg Co.*, 113 App. Div. 689, 99 N. Y. Supp. 923.

An employee upon a lighter from which a vessel is being loaded, whose work was to shovel ballast from the deck of the lighter onto a staging outside the vessel, who upon his own account goes upon the deck of the vessel and is there injured by falling into a hatchway, was outside his employment and the master owed him no duty of protection.<sup>67</sup>

So an employee riding upon an elevator of his employer, merely for his own convenience or pleasure, cannot recover.<sup>68</sup>

### § 743. After working hours.

It has been held, as stated in a preceding chapter, that an employee after finishing his day's work, in going to a closet for his clothes, is to be considered, at such time, in the employment.<sup>69</sup>

The case, however, was quite different where a brakeman had changed his clothes after an incoming trip, and subsequently went upon the caboose in search of his clothing, and was injured while jumping therefrom, caused by an alleged defective switch stand. Under such circumstances, it is clear, he was not engaged in the line of his employment.<sup>70</sup>

It was held, however, that a servant of a stevedore who goes into the hold of a ship after his coat, after the loading is finished, is rightfully there, and entitled to the same reasonable care on the part of the officers to not expose him to danger as when at actual work.<sup>71</sup>

The opening of a ventilator, as commanded by a foreman, during the noon recess, has been held within the scope of the employment of a common laborer.<sup>72</sup>

Workmen, while descending from their place of work on

67. *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153.

68. *O'Brien v. Western Steel Co.*, 100 Mo. 182, 13 S. W. 402.

69. *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 36. See also *supra* —.

70. *Olson v. Minneapolis & St. L. R. Co.*, 76 Minn. 149, 78 N. W. 975, 48 L. R. A. 796.

71. *Bodin v. Demwold*, 56 Fed. 846.

72. *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

top of a building, at the noon hour, it was held, were within the line of their employment.<sup>73</sup>

But where an employee in a scourer in a carpet mill voluntarily undertook after hours to help run a line of hot water pipe over a vat of boiling caustic soda, standing upon a plank which slipped, throwing him into the vat, it was held the master was not liable.<sup>74</sup>

**§ 744. Going to and from place of work.**

An employee, while going from his place of work at night to a near by town for lodging, at the direction of the employer who is to furnish it, was held to have been within the scope of his employment, so as to render the employer liable for injuries sustained by falling into a deep hole dug by the master in the field which the servant was crossing.<sup>75</sup>

But it was held by the Minnesota court that workmen engaged in repairing a track, while going from their place of work to boarding cars, upon hand cars furnished by the company at their request and for such use, injured by a collision of such cars, were not, within the meaning of the statute, at such time engaged in the discharge of their duties under their employment.<sup>76</sup>

However, it was subsequently held that one of a bridge gang, while riding upon a hand car to his place of work, and injured in the same manner as above stated, by a collision of hand cars, was engaged in his duties as an employee, within the statute.<sup>77</sup>

The court distinguishes the latter case from the former in that in the former the defendant had no control over the men at that time and had not undertaken to transport them, and in no sense were they acting in the performance

73. *Boyle v. Columbian Fireproofing Co.*, 182 Mass. 93, 64 N. E. 726.

74. *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. St. 573, 57 Atl. 986.

75. *Indiana Pipe L. & R. Co. v. Neusbaum*, 21 Ind. App. 361,

52 N. E. 471. See also *supra* —.

76. *Benson v. Chicago, St. P. & O. R. Co.*, 78 Minn. 303, 80 N. W. 1050.

77. *Wallin v. Eastern R. Co.*, 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481.



of their duties, while in the latter case it was assumed from the pleadings that the employment of the men commenced each day when they started to go upon the road until they returned, and that defendant agreed to transport them to and from their place of work.

**§ 745. While resting.**

An employee, who, under the master's rules, may take a turn at resting, is at such time within the scope of his employment, and may use his discretion in selecting a place to rest, but may not needlessly wander from the proper sphere of his work into other departments, and if, while in a proper place, he is injured by a set screw, not guarded as required by the statute, the master will be liable.<sup>78</sup>

An employee, while eating his lunch in a place permitted by the employer, was held to have been in the employment though he is working by the hour.<sup>79</sup>

Where an employee, after having laced a belt, had finished that work, and then, without placing it on the pulley, merely idled with it, and thus received an injury, it was held the master was not liable for an injury caused by the employee assuming an unnecessary risk, received when not engaged in the discharge of any duty assigned to him.<sup>80</sup>

**§ 746. Momentarily engaged in conversation.**

The mere fact that an employee, when injured, was talking to a fellow-workman about the operation of the machine in the mill, having stopped for a moment while passing along a public passage way in the mill, did not place him beyond the scope of his employment. A belt broke injuring him where he stood eight feet from it.<sup>81</sup>

78. *Pittsburg Vitri-fied Pac. & Bldg. Brick Co. v. Fisher*, 79 Kan. 571, 100 Pac. 507; *Jacobson v. Merrill Rutg. Co.*, 107 Minn. 74, 119 N. W. 510, 22 L. R. A. 309.

79. *Heldmaier v. Cobbs*, 196 Ill. 172, 62 N. E. 853.

80. *Ball v. Vicksburg, S. & P. R. Co.*, 123 La. 7, 48 So. 565.

81. *Moore v. W. R. Pickering Lbr. Co.*, 105 La. 504, 29 So. 990.



**§ 747. Servant working in different manner.**

The master has a right to expect, when he furnishes an appliance not defective, that a servant who has experience, or has been properly instructed as to the manner of its use, will use it in such manner, and if he uses it in an improper or unsafe manner, whereby injury comes to him, he will have no cause for complaint, and if injury comes to others from such improper use, the master will not be liable from the fact alone, unless the person injured is one to which he owes a positive duty. The negligence of such an employee is ordinarily that of a fellow-servant and a risk assumed. In such a case, the question of scope of employment is not involved, it being within the employment to operate the machine or appliance. When, however, the appliance is used for a different purpose than that designed, it might be said that the servant was acting outside the line of his employment.<sup>82</sup>

And where he is authorized to pursue a certain course or adopt a line of action other than the operation of an appliance, and he adopts that which is other than within his authority, it may be said he is acting outside the line of his duty, as where a lineman, employed by a telegraph company, chose a different way to reach a building than the way for which he had a license, and was injured while thus upon an adjoining building by contact with an uninsulated wire, it was held that he was not acting within the scope of his license, and therefore could not recover.<sup>83</sup>

It cannot be said, however, that mere deviation from the prescribed method, has the effect to make the act out of the line of duty, where it in no manner affected the cause of injury, as where a hostler taking charge of an engine to take it to the round house, before doing so, ran out some distance on the main track to take the yard master to dinner, it did not have the effect, after his return and while proceeding to the round house, to render

82. *Wolff v. Walter A. Wood Harv. Mach. Co.*, 67 Minn. 423, 70 N. W. 156.

83. *Hector v. Boston Electric Light Co.*, 161 Mass. 588, 37 N. E. 773.

the duty he was charged to do, to make it a duty outside of the scope of his employment.<sup>84</sup>

An act is not necessarily outside the scope of the duties of a servant, it is held, because in violation of the rules of the master.<sup>85</sup>

**§ 748. Servant as within scope when acting pursuant to orders and vice versa when not.**

A member of one section gang, ordered by his foreman to assist another gang, is, while so engaged, within the scope of his employment. Where, however, such employee voluntarily and without orders from his foreman, is engaged in assisting another gang he is not within the scope of his employment.<sup>86</sup>

**III. ACTS OUTSIDE SCOPE OF DUTY, NOT PURSUANT TO ORDERS.**

**§ 749. General rule.**

The general rule is that if a servant is injured while performing work not within the scope of his employment, and which he was not ordered to do, or while acting in any way outside the scope of his employment, the master is not liable.<sup>87</sup>

84. *Jensen v. Omaha & St. L. R. Co.*, 115 Ia. 404, 88 N. W. 952.

85. *Masterson v. Galveston, H. & S. A. R. Co.*, 42 S. W. (Tex. Civ. App.) 1001.

86. *Southern Ry. Co. v. Guyton*, 122 Ala. 231, 25 So. 34.

87. *Southern R. Co. v. Guyton*, 122 Ala. 231, 25 So. 34; *Ray v. Diamond State Steel Co.*, 2 Pennw. (Del.) 525, 47 Atl. 1017; *Central R. & Banking Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273; *Sears v. Central R. & Banking Co.*, 53 Ga. 630; *Chicago & A. S. & R. Co. v. Collins*, 43 Ill. App. 478; *Mitchell-Tranter Co. v. Emmett*, 23

Ky. L. Rep. 1788, 65 S. W. 835 55 L. R. A. 710; *Lewis v. Coupe*, 200 Mass. 182, 85 N. W. 1053; *Mellor v. Merchant's Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; *Freeberg v. St. Paul Plow Works*, 48 Minn. 99, 50 N. W. 1026; *Stagg v. Edward Weston Tea & Spice Co.*, 169 Mo. 489, 69 S. W. 391; *Cowhill v. Roberts*, 71 Hun (N. Y.) 127, 24 N. Y. Supp. 533; *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. St. 573, 57 Atl. 986; *St. Louis Southwestern R. Co. of Texas v. Spivey*, 97 Tex. 143, 76 S. W. 748; *Eckles' Adm'x v. Norfolk & W. R. Co.*, 96 Va. 69, 25 S. E. 545; *Johnson v. Armour*,

18 Fed. 490. It was said (the facts not being given), it plainly appearing from the plaintiff's own testimony as a witness, that he voluntarily and without being so ordered by any superior, undertook to operate a dangerous machine with which he was unfamiliar, and that it was entirely outside the scope of his regular employment so to do, and there being no emergency which would justify a departure by him from the ordinary line of duty, he was not entitled to recover from his master, the defendant, for injuries thus occasioned, although in point of fact the machine was at the time in a defective condition. *Central R. & B. Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273. Recovery was denied a boy of thirteen years who was injured while trying to remove an obstruction from a machine while in motion, it being no part of his duties. *Michalofski v. Pittsburg Screw & Bolt Co.*, 213 Pa. St. 563, 62 Atl. 1112.

**BRAKEMAN SWITCHING IN YARD.** Where a brakeman upon a passenger train was directed, with the train crew, to do switching in the company's yard, and he complied with such directions and performed such duties while at such station for two months, when he was injured while in the act of coupling cars, one of which was loaded with lumber projecting over the end of the car, it was held he could not recover from the company upon the ground that the services was beyond the scope of his employment, and therefore the risk was not assumed. *Jones v. L. S. & M. S. R. Co.*, 49 Mich. 573, 14 N. W. 551.

**ELEVATOR. OPERATING BY ONE NOT SO EMPLOYED.** A boy em-

ployed to operate an elevator has no authority to transfer its operation to another, such for instance, a painter, who is painting the elevator shaft, and hence if such other is injured while running the elevator, the employer will not be liable. *Arzt v. Lit*, 198 Pa. St. 519, 48 Atl. 297.

**CONDUCTOR UNCOUPLING CARS.** Where a freight conductor was injured while uncoupling cars, which was no part of his duty, and was contrary to the defendant's rules, and there was no pressing emergency for him to perform this duty at the time, it was held it was not error to grant a new trial when a verdict was found for the plaintiff. *Kane v. Savannah, F. & W. R. Co.*, 85 Ga. 858, 11 S. E. 493.

**REPAIRING ROOF.** An employee injured while performing work on the roof of his employer's mill, which was not within the scope of his employment, was held a mere volunteer and could not recover. *Emmett v. Mitchell Tranter Co.*, 26 Ky. L. Rep. 303, 80 S. W. 1148; *Emmett v. Mitchell Tranter Co.*, 23 Ky. L. Rep. 1788, 65 S. W. 835, 50 L. R. A. 710.

**LEAVING SAFE POSITION TO STOP RUNAWAY CAR.** Where a servant left his place of safety voluntarily, and without direction, to stop a runaway car, and was injured by a second runaway car, having no duty to perform about such car or its operation, and there was no evidence that the master could have prevented the injury after the car was in motion, the master was not liable although such car ran away because of a defective brake, since the proximate cause of the injury was the servant's volun-

And this rule ordinarily applies equally well where the injured servant is a minor.<sup>88</sup>

**Baggage man taking and delivering message.**

The taking and delivering of a message addressed to one of a section crew by a baggage man on a train, to be thrown off to him, was not within the scope of employment of such baggage man, and where he was killed by contact with a rod, while leaning out of the door of the car to throw off the message, the master was not liable.<sup>89</sup>

**Forbidden act.**

Where an employee was killed in using a cage at the bottom of a mine, contrary to express orders not to do so, no recovery could be had against the master; and evidence of an alleged custom of employees to use the cage was held inadmissible.<sup>90</sup>

tary act. *McGill v. Maine & N. H. Granite Co.*, 70 N. Hamp. 125, 46 Atl. 684, 85 Am. St. Rep. 618.

**STATION EMPLOYEE ACTING AS BRAKEMAN.** An employee at a station, voluntarily acting as a baggageman on an excursion train, upon which he was a passenger, injured by a defective handhold on the car, was not injured within the scope of his employment, and the company was not liable. *Wagen v. Minneapolis & St. L. R. Co.*, 80 Minn. 92, 82 N. W. 1107.

**TRAIN DISPATCHER CROSSING TRACKS.** A railroad company owes no duty to unauthorized persons in its switch yards except ordinary care to avoid injury to them after their peril is discovered. The rule applied to a train dispatcher in crossing tracks at a place where not authorized. *Louisville & N. R. Co. v. Hocker*, 23 Ky. L. Rep. 982, 64 S. W. 638.

88. See *Hyde v. Mendel*, 75 Conn. 140, 52 Atl. 744; *Daly v. H.*

*Haller Mfg. Co.*, 48 La. Ann. 214, 19 So. 116; *Michael v. Henry*, 209 Pa. St. 213, 58 Atl. 125. Where a boy fourteen years of age was assigned to work at a trimming machine operated by another boy, and his duties were not in connection with the operation of the machine, but in connection with the material used, and he voluntarily, when something stopped the machine and the operator ran away, attempted to pull a cap out of the machine, and while making such effort the machine suddenly started and caught his hand, it was held there was no neglect on the part of the master which caused the injury, and therefore he could not recover. *Gillen v. Rowley*, 134 Pa. St. 209, 19 Atl. 504.

89. *McTaggart v. Maine Cent. R. Co.*, 100 Me. 223, 60 Atl. 1027.

90. *Contri v. Hollingsworth Coal Co.*, 143 Iowa, 115, 121 N. W. 506.

So where an employer clearly and explicitly forbids his employee to do a certain act around or in connection with the machine on which he is working, and the employee, while violating such prohibition, and as a result thereof, receives an injury, he cannot hold the master responsible. This rule applies to a minor as well as an adult.<sup>91</sup>

And where an employee attempted to couple cars, which was not a duty he was required to perform, and he had been expressly directed not to attempt so to do, it was held that he had no ground for recovery against the master for injuries received in attempting to perform such act.<sup>92</sup>

#### **Freight conductor coupling cars.**

It is not the duty of a freight conductor to couple and uncouple cars except in the case of a pressing emergency, of which the jury must judge. If one such is killed while performing such service, in the absence of such emergency, he is not without fault, and his widow cannot recover damages from the company.<sup>93</sup>

Upon a subsequent appeal, when the lateness of the train was relied upon as being a sufficient emergency to justify the act, it was held that the plaintiff must affirmatively show that the emergency which justified the act was not due to the fault of such conductor.<sup>94</sup>

#### **Repairs, making where not a duty.**

Where an employee in a mill undertakes of his own free will to make repairs, outside of his regular duty, on a defective pulley and belt, upon the suggestion of a fellow-workman who had no authority over him, and with the mere consent of his own immediate superior, and he built a staging, and just before the time for stopping the machinery for the day, while standing with his arm on

91. This rule applied where a minor had been forbidden to remove a substance from the rollers of a machine while in motion. *Card v. Wilkins*, 61 N. J. L. 296, 39 Atl. 676.

92. *Gardner v. Mich. Cent. R.*

3 M. & S.—2

*Co.*, 58 Mich. 584, 26 N. W. 301.

93. *Sears v. Central R. & B. Co.*, 53 Ga. 630; *Central R. & B. Co. v. Sears*, 59 Ga. 436.

94. *Central R. & B. Co. v. Sears*, 61 Ga. 279.

the staging, facing the belt and close to it, waiting for it to stop, the belt came off, caught his arm and caused him injury, it was held that he voluntarily took the risk of an obvious danger and could not recover under the statute, although he was in the exercise of great care.<sup>95</sup>

**§ 750. Servant working in different place.**

The duty of the master to furnish his servant with a reasonably safe place in which to work, is limited to the premises where he is required to be for the performance of his work.<sup>96</sup>

Where one employed to do a designated kind of work or to work in a designated place, voluntarily goes to a different place from that assigned him, he precludes himself from insisting that the master must exercise ordinary care to protect him from injury.<sup>97</sup>

**Engine hostler going ahead of engine.**

The rule was applied where an engine hostler, while going ahead of his engine to open a switch, was injured in stepping into a trench, his place of duty being upon the engine, such engine being operated by a fellow-hostler at his request.<sup>98</sup>

**Scrub woman going into dark room for material.**

And where a servant engaged in scrubbing offices went into a dark room where her employment did not call her, in search of materials to do her work, and fell down an elevator shaft, it being her duty to call the watchman who would furnish the materials, she could not recover.<sup>99</sup>

**Employee leaving place of work to adjust a belt.**

And where a boy fourteen years old, employed in a tin-ware factory to operate a small foot machine, voluntarily

95. *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792.

96. *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 65 Am. St. Rep. 153. See also *supra* —

97. *Green v. Brainard & N. M. R. Co.*, 86 Minn. 318, 88 N. W. 974:

*Lang v. Kansas City Bolt & Nut Co.*, 131 Mo. App. 146, 110 S. W. 614.

98. *Baltimore & Ohio R. Co. v. Doty*, 133 Fed. 866.

99. *Jorgenson v. Johnson Chair Co.*, 169 Ill. 429, 48 N. E. 822.

left his place and went to another part of the establishment to adjust a belt, and while thus engaged received fatal injuries, it was held, in an action brought by his parent against his employer, that there could be no recovery, it not appearing that any such duty was imposed upon him by the defendant's servants or agents, though it did appear that he had voluntarily performed the act on other occasions, which was known to or sanctioned by the defendant's superintendent or foreman.<sup>100</sup>

#### **Riding velocipede on track.**

And where an employee of a railroad company, required to work other than upon the railroad proper, was injured while riding a velocipede upon the track, though without objection from the company, it was held he was a trespasser. If he obtained the consent of the company, which was granted at his risk, he cannot recover for injuries received through the ordinary negligence of trainmen, but only in case of wilful negligence.<sup>101</sup>

#### **§ 751. Acts in emergencies.**

In the chapter on contributory negligence, the rule has been stated that an act which would be contributory negligence on the part of the injured servant may be otherwise because of the existence of an emergency.<sup>102</sup>

So, risking life to save life is often excused because of the existence of an emergency.<sup>103</sup>

However, where a person goes outside the scope of his employment to save life, he cannot recover where the master was in no ways negligent.<sup>104</sup>

And attempting to protect the master's property from destruction by fire, where the risks are obvious, imposes no liability on the master.<sup>105</sup>

100. *Daly v. Manufacturing Co.*, 48 La. Ann. 214, 19 So. 116.

101. *Craig v. Mount Carbon Co.*, 45 Fed. 488.

102. See *supra*, § 496.

103. See *supra*, § 500.

104. *Saylor v. Parsons*, 122 Ia. 679, 98 N. W. 500, 64 L. R. A. 52, and cases cited.

105. *Mattbie v. Belden*, 167 N. Y. 307, 60 N. E. 345, 54 L. R. A. 52.



However, where an emergency exists, it would seem that the common sense rule should protect a servant who renders assistance although not within the scope of his duties.<sup>106</sup>

And it has been held that while as a general rule the servant has no claim for damages for injury received while voluntarily assuming to do something which the master did not employ him to do, yet, in case of emergency, he may of his own volition step outside of the line of his usual duties, and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is required to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings. Hence it was held that an engineer who left his engine in charge of the fireman, in violation of the rules of the company, and stepped on the main track and signaled the fireman to move his train on the sidetrack, and while thus engaged was run over and killed by a hand car in charge of section men, that he was not so without the scope of his employment, or negligent,

106. See *Mullin v. Northern Mill Co.*, 53 Minn. 29, 55 N. W. 1115; *Carroll v. East Tennessee R. Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214. Where a mechanic in a saw mill, whose general duty it was to assist in making repairs, was directed by the operator of an appliance and machine to replace a chain which had fallen from its place on a wheel, and he was injured by contact with the unguarded knives of such machine, and it appeared the mill wright and foreman were not present, whose duties were in connection with the directing and adjustment of machinery, and that unless the chain

was adjusted the mill would have been idle during their absence, it was said that, under such circumstances, to prevent a suspension of the work in the mill, the rule ought to apply which would authorize the operator of the machine to call for assistance upon any of the employees whose business it was to assist in making repairs. It was held that the evidence was sufficient to sustain a finding that he was properly engaged as a servant of defendant in the course of his employment when the accident occurred. *Mullen v. Northern Mills Co.*, 53 Minn. 29, 55 N. W. 1115.



but that his representatives could recover from the master damages for his death.<sup>107</sup>

§ 752. Effect of custom.

Where a servant is injured while performing an act wholly outside the scope of his duties, evidence of a custom of employees to do such act has been held inadmissible.<sup>108</sup>

However, it would seem that where the act is closely connected with the duty, even if not strictly within the scope of the employment, the fact that such act had been previously done by the injured servant, to the knowledge of the foreman in charge of the work, without objection, tends to prove the act was authorized, although the practice does not amount to a general custom.<sup>109</sup>

IV. OBEDIENCE TO ORDER TO PERFORM WORK OUTSIDE SCOPE OF EMPLOYMENT.

§ 753. In general.

In some early cases, there is language which would seem to promulgate a rule that the mere fact that one servant has authority over another, and orders the subordinate to do an act not within the scope of his employment, whereby he is exposed to danger not contemplated by his contract of service, and he is injured in so doing, renders the master liable.<sup>110</sup>

107. *Barry v. H. & St. J. R. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 43.

108. *Texas, M. R. R. v. Taylor*, 44 S. W. (Tex. Civ. App.) 892.

109. *Morbey v. Chicago & N. W. R. Co.*, 105 Ia. 46, 74 N. W. 751.

110. *Gilmore v. Northern Pac. R. Co.*, 18 Fed. 866; *Thompson v. Chicago, M. & St. P. R. Co.*, 14 Fed. 564; *Linderberg v. Crescent Min. Co.*, 9 Utah, 163, 33 Pac. 692; *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28. Where a fire-

man employed to tend an engine fire was called upon by the engineer to assist him in throwing on a belt, and was injured while making the effort, it was said that if the fireman employed as such was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, outside of his sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a particular or greater risk at that time, and of which he was not in-

However, in no well considered case is it held that the mere fact that the master or his representative orders a servant into more dangerous work, outside the scope of his employment, is of itself, negligence, so as to make the master liable where the servant is injured while engaged in such work. The rule is that where the servant voluntarily and without objection consents to perform such new service, and he is not subjected to latent or hidden dangers, negligence on the part of the employer cannot be predicated upon the ground that he was directed to perform a service outside his regular employment,<sup>111</sup> except possibly in the case of minor servants under certain circumstances.<sup>112</sup>

#### § 754. Acting outside scope as defense.

It is no defense to an action for personal injuries that the injured servant, at the time of the injury, was acting outside the scope of his employment, where pursuant to the orders of the master or his authorized representative.<sup>113</sup>

#### § 755. Authority of servant giving command.

If the servant giving the order to perform work outside of the scope of the employment of the injured servant, had no authority to do so, the master is not liable.<sup>114</sup>

formed or cautioned, the master will be liable. *Mann v. Oriental Printing Works*, 11 R. I. 152.

111. *Wormell v. Maine Cent. R. Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321; *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280; *Cole v. Chicago & N. W. R. Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201; *Wheeler v. Berry*, 95 Mich. 250, 54 N. W. 876; *Paule v. Florence Mining Co.*, 80 Wis. 350, 50 N. W. 189; *Hogan v. Northern Pac. R. Co.*, 53 Fed. 579.

112. See *infra*, § 757.

113. *Krueger v. Bartholomay*

*Brewing Co.*, 94 App. Div. 58, 87 N. Y. Supp. 1054.

114. *Pittsburg, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Nashville & C. R. Co. v. McDaniel*, 80 Tenn. 386; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423; *Walker v. Lake Shore & M. S. R. Co.*, 104 Mich. 606, 62 N. W. 1032; *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 95 N. W. 72; *Parent v. Nashua Mfg. Co.*, 70 N. H. 199, 47 Atl. 261; *Texas & N. O. R. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001. See also *Martin v. Highland Park Mfg. Co.*, 128 N.

**Obedience to direction of foreman to perform an act outside of working hours.**

Where a workman was called upon by the foreman during the noon hour to open a ventilator, and he was injured, and it appeared he had before refused to do any work outside of his regular duties at such foreman's request, but had been told by the foreman in charge of the elevator to do what such foreman called upon him to do, it was said that whatever a workman does, under competent authority, for the comfort and convenience of his fellow workmen, is presumed to be for his employer's bene-

C. 264, 38 S. E. 876, 83 Am. St. Rep. 671. But see *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. While the work on a building undertaken by several men under the direction and control of a foreman, was suspended temporarily to permit the unloading paper rolls from a van and rolling them into the basement of the building, and such men were directed by such foreman to assist in unloading the paper rolls, it was held the master was not liable for their acts while so engaged. *Brown v. Jarvis Eng. Co.*, 166 Mass. 75, 55 Am. St. Rep. 382.

**ASSISTING FELLOW-SERVANT.** A servant injured while absent from his place of duty assisting a mere fellow-servant in his work, upon the latter's call, is but a mere volunteer and cannot recover of the master for his injuries. *Werner v. Trautwein*, 25 Tex. Civ. App. 608, 61 S. W. 447. Where a servant employed in defendant's coal mine, at the request of another servant, left the place where he was at work, to assist a fellow-servant in propping the mine, and while so engaged was injured by falling slate, and it appeared that it was

not his duty to prop the mine and that such fellow-servant had no control over him, it was said that if it was not his duty, and he was ordered to do it by one who was not authorized to command him, the company would not be liable. *Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18 S. W. 255. See also, as sustaining the principle, *Railroad Co. v. McDaniel*, 12 Lea 386; *Bradley v. Railway Co.*, 14 Lea 374. Where the master of defendant's ferry boat, used to transport cars across the river, at the request of a conductor of one of defendant's trains, attempted to couple some cars and was injured, it was said that a person who voluntarily assists the servant of another in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on a master than a hired servant. The same rule is applicable if a servant, of his own motion, at the request of a fellow-servant, should undertake temporarily to perform the duties of a fellow-servant. *Osborne v. Knox & Lincoln R. Co.*, 68 Me. 49.

fit, and if such work is not so foreign to his employment that he would be justified in refusing to do it, the fact that he was hurt outside of working hours will not affect the rule.<sup>115</sup>

**Conductor inviting workmen to ride on his train.**

In the absence of evidence that a conductor was acting within the scope of his employment in stopping his train and inviting workmen to ride therein to their place of work, not being a train provided for the conveying of men to and from their place of work, the railroad company was not bound to use reasonable care to transport such an employee so riding on one of the cars, in safety.<sup>116</sup>

**Conductor ordering a brakeman to couple cars.**

In ordering a brakeman to couple the air brakes between cars, and assuring the brakeman that he would look out for him, but failing to notify him of the approach of a switching engine, a jury might properly infer that a conductor of a freight train or superintendent was acting within the scope of his employment, it being shown that it was the general practice of such superintendent to order his men to couple the hose between cars that had been coupled, although the train was not fully made up; that such general practice was known to the officials of the company and approved by them, though under the terms of his employment he had nothing to do with the train while it was being made up.<sup>117</sup>

**Elevator operator inviting employee to ride thereon.**

An employee accepting the invitation of a co-employee operating a freight elevator to ride on the same, the latter acting without authority, assumes the risk; and the mere fact that on the first day the elevator was operated, a number of the employees did ride upon the same without

115. *Broderick v. Detroit U. R. S. & D. Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

116. *Chicago Terminal Trans-*

*fer R. Co. v. Schiavons*, 216 Ill. 275, 74 N. E. 1048.

117. *Edgar v. New York, N. H. & H. R. Co.*, 188 Mass. 420, 74 N. E. 911.

the knowledge or consent of the employer, does not establish a custom or implied consent.<sup>118</sup>

**Employee requesting another to go in a place where her duties did not require her.**

A chambermaid, who, at the instance of a fellow-servant, went into an inclosure surrounding a glass floor, and it broke, causing her injury, it being no part of her duties to go there, could not charge the master with liability.<sup>119</sup>

**Employees riding on train by permission of trainmen.**

The presumption of law is that persons riding on construction trains and not employed in actual service thereon or in connection therewith, are not lawfully there, and if permitted to be there by the employees of the company the presumption is against their authority to bind the company. But this presumption may be overcome, as for instance when the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes.<sup>120</sup>

**Employee calling assistance with acquiescence of overseer.**

Where an overseer of a room in a mill imposed upon a workman labor which it was impossible for him to perform without assistance, and knowingly acquiesced in his obtaining assistance from such other workmen in the room as he chose to call, and the former, in good faith and for the purpose of performing such labor, though not in the exercise of good judgment, ordered a boy to assist him, who was unfit by reason of lack of instruction, and while rendering such assistance the latter was injured, it was held that the owner of the mill was liable.<sup>121</sup>

118. *Sievers v. Peters B. & L. Co.*, 151 Ind. 642, 50 N. E. 877.

119. *Ahern v. Mildreth*, 183 Mass. 296, 67 N. E. 328.

120. *Rosenbaum v. St. Paul & D. R. Co.*, 38 Minn 173, 36 N. W. 447.

121. The facts were that a boy fourteen years old was called to assist in working upon a machine and his hands became caught between revolving rolls in plain sight. *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275.

**Employee calling a minor employee to assist in mending a belt.**

Where a boy thirteen years old was employed in a factory to sweep, carry water and fill buckets with quills, and he was ordered by another employee who had no control over him (unless, as was assumed by the court, the absence of bosses in the room gave him such control) to assist him in mending a belt, and in so doing to occupy a dangerous position, and while so assisting the boy became caught in the revolving belts and was injured, it was held that the defendant was liable: (1) Upon the ground that by the act of its agent it exposed the boy to peril outside the ordinary risk incident to his contract of service; (2) In the attempt to run the machinery with an insufficient number of hands the occasion arose which contributed to produce, if it did not directly cause, the injury.<sup>122</sup>

**Foreman of one room directing employee under control of foreman of another.**

Where a child twelve years old was employed by the foreman of defendant's boilershop to work in the tool room connected therewith, and was instructed to obey the boss of that room, his work being that of cleaning tools, putting them in place, giving them to employees, and doing errands, and he was, at a time when there was no such work for him to do, sent by his boss into an adjoining room to work, and while there was directed by one of the employees of that room to assist in the working of a dangerous machine, which he did, and while so engaged was injured, and it appeared that the foreman of the boiler shop had full authority to hire and discharge hands, but that the boss of the boiler shop was merely authorized to direct the manner the work in that room was to be performed, and had no power to employ hands, it was held that the boss of the tool room had no authority to

122. Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92.

direct the boy to seek employment in the boiler room, and the defendant therefore was not liable for his injuries.<sup>123</sup>

**Loom fixer requesting assistance of weaver.**

Where a weaver was injured while assisting the loom fixer in repairing a loom, at the latter's request, there was no liability on the part of the master where the loom fixer was without authority to put the plaintiff at any other work than weaving.<sup>124</sup>

**Section boss sending one of his crew to signal train after working hours.**

Where a section boss sent one of the section hands, after a day's labor, to signal passing trains of danger, and in some unexplained manner he was killed, it was held that the section boss was performing a proper and customary duty; that it had been customary for the section hands to render this service, as they were paid extra for it, and as it was evident that the deceased undertook it willingly he could not recover.<sup>125</sup>

**Weaver assisting a belt adjuster.**

One employed as a weaver in a factory, who had nothing to do with the belts or machinery, injured while assisting another employee to adjust a belt, at the request of the latter, there being no evidence that he had any authority to permit or require the weaver to assist him, was held to have assumed the risk.<sup>126</sup>

**§ 756. Assumption of risks.**

Where a servant is ordered to do an act outside the scope of his employment, and obeys the order, the risk is not an ordinary one but an extraordinary one, and the assumption of the risk will generally depend on knowledge of the servant, actual or constructive.<sup>127</sup>

123. *Fisk v. Central Pacific Co.*, 72 Cal. 39, 13 Pac. 144, 1 Am. St. Rep. 22.

124. *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

125. *Wadlington v. Newport*

*News & M. V. R. Co.*, 44 Ky. L. Rep. 559, 20 S. W. 783.

126. *Parent v. Nashua Mfg. Co.*, 70 N. Hamp. 149, 47 Atl. 261.

127. If one having authority over a servant directs him to do an act outside the scope of his em-



The question often arises in cases where the servant is required to perform temporarily a dangerous service outside of the duties which he was employed to perform, whether or not or to what extent he assumes the risk. It is argued that the risks attending such new service are not within the contract of employment and hence not an ordinary risk. It is generally conceded that such risks are not

employment, the servant in the performance of such outside work assumes the risk only if such danger is apparent. As said in *Bailey's Master's Liability*, p. 22: "The same duty rests upon the master as to warning and instruction as to duties within the scope of the employment, but as to temporary work outside of the employment, the same presumption does not apply, to wit, that he (the servant) is competent to perform the duties of the position which he seeks, and competent to apprehend and avoid all dangers that may be discovered by ordinary care. However, he is presumed to be competent to know and comprehend obvious dangers, which requires no skill or experience to appreciate, or such obvious dangers as the skill and experience he may have ought reasonably to charge him with. If, therefore, a laborer who attempts to perform a hazardous service temporarily outside of his employment, at the request of the master, though not objecting, is injured while performing such duty, his apparent consent alone will not defeat his right of recovery, though the danger is apparent to a person possessed of skill, but not to a common laborer.'" This was said where a railroad employee, having been ordered by a superior to cut a trolley wire crossing defendant's tracks, mounted a

step ladder placed on top of a car, and throwing his arm over the wire drew it down and cut it with a pair of nippers, the recoil throwing him to the ground and killing him. It appeared that trolley wires were new in the locality, and that deceased was wholly unskilled in the work; that the nippers were insufficient alone for the safe performance of the duty, and deceased was given no warning except that he must hold the nippers loosely. The question whether the danger was apparent was held to be for the jury. *Walker v. Lake Shore & M. S. R. Co.*, 104 Mich. 606, 62 N. W. 1032. Where a blacksmith in the employ of the defendant was called upon to push cars upon a track and was injured by contact with a structure close to the track, it was said that if, under the circumstances stated, he was called upon by the foreman to assist in this work, which was outside of the work he was employed to do, and in a place where he had not before done such work, and if the peril was not obvious to him, and he failed to notice that the space between the car and the building was too narrow for him to pass through with safety, and his attention was so given to the work which he was doing that he did not discover the danger until it was too late to save himself, it could not be said, as



ordinary risks but on the other hand it is held, in most jurisdictions, where the danger is obvious, that they come within the rule relating to obvious risks. This, however, is not conceded by some of the courts which seem to hold that even if obvious, the risk is not assumed, in the absence of special instruction and warning. The liability upon the master in cases of injuries to a servant received

matter of law, that he must be held to have assumed the risk. The case is close. *Ferren v. Old Colony R. Co.*, 143 Mass. 197, 9 N. E. 608. Whether a servant called from his regular employment to perform a service in removing substances from under a machine, a work with which he was unfamiliar, assumed the risk of removing the same with his hand when the machine was in motion, was held a question for the jury. *Hillsboro Oil Co. v. White*, 54 S. W. (Tex. Civ. App.) 432.

**EMPLOYEE COUPLING CARS.** Where a railroad employee of mature years and long experience was injured while coupling cars in obedience to the orders of his immediate superior, it was held that he could not recover therefor because that duty was outside of his employment, when he made no objection to performing it, and there was no threat of dismissal in case of refusal. *Hogan v. Northern Pacific R. Co.*, 53 Fed. 519. [*Jones v. Railroad Co.*, 49 Mich. 573, 14 N. W. 551, disapproved.]

**FOREMAN BRIDGE CREW; SWITCHING.** Where the foreman of a gang of men engaged in constructing buildings and bridges for a railroad company was directed to take his engine and men and do some switching, and he undertook such

work without objection, and was injured, it was held that his action could not be maintained. It was said: He made no objections to doing the work on the ground that it was dangerous, or that he had not sufficient knowledge or experience to do the same with safety to himself and the men under his charge. Under these circumstances no negligence can be attributed to the company for directing him to do the work. He undertook voluntarily, knowing the general danger of the employment, and the rule applicable to work done in his ordinary employment must be applied to work done by him under such order. *Cole v. C. & N. W. R. Co.*, 71 Wis. 114, 37 N. W. 85, 5 Am. St. Rep. 201.

**OPERATING SAW.** Where an employee, working with a slab car which was defective, was told by the foreman to fix it up as best he could and he would have it repaired, and such employee voluntarily took a piece of lumber to a saw mill, and personally undertook, by the use of the saw, to make such a piece as he desired for making the temporary repairs, and in the use of the saw he was injured, it was held that he had no ground for recovery; that the order of the foreman did not extend to a direction to use a dangerous machine, with the

in a dangerous employment, outside of that for which he is engaged, arises not from the direction of the master to depart from the one service and to engage in the other, but from failure to give proper warning of the attendant danger, in cases where the danger is not obvious, or where

use of which he was inexperienced. *Lindstrand v. Delta Lumber Co.*, 68 Mich. 261, 36 N. W. 67.

**OPERATING SAW UNDER PROTEST.** Where a young man was told that he could either run a split saw or lay off, and he was injured while engaged in such service, it was held he could not recover upon the ground that such work was beyond the scope of the work he was employed to do. *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478, 30 N. W. 109. Where, however, an employee was injured while using a circular saw in defendant's factory, and one of the grounds urged in favor of a recovery was that the work was outside of the duties he was engaged to perform, and there was evidence to the effect that he protested against performing such work and did it unwillingly, it was said, even if the work was without the scope of his employment, he could not, by his protest, cast all the risk of the accident upon the employer. An employee under such circumstances has his choice either to leave his employment or to remain and assume all the risks incident to the work he knows he is expected to do. *Wheeler v. Berry*, 95 Mich. 250, 54 N. W. 876. It was said that *Chicago & N. W. Railway Co. v. Bayfield*, 37 Mich. 205, was decided entirely upon the inexperience of

the boy; that *Broderick v. Depot Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382, was clearly distinguishable.

**TRAMMER IN MINE FIXING ROOF.** Where a trammer in a mine was directed by the captain to help a miner to fix the roof, and while doing so he was injured by ore or rock falling from the roof, which had just been tested in his presence and which seemed to be solid, and it appeared he had been tramming for four winters in this and other stopes, it was held that he must have known the danger of this temporary employment, and, having undertaken it without objection, he assumed the risk. *Paule v. Florence Mining Co.*, 80 Wis. 350, 50 N. W. 189.

**MERE FACT WORK OF DIFFERENT KIND DOES NOT PRECLUDE DEFENSE OF ASSUMED RISK.** The mere fact that the actual work a miner is engaged in at the time of receiving injury, is of a different kind from that he was employed to do, but which he undertook without objection at the request of the foreman, does not prevent the application of the rule of assumed risks as to the dangers from falling ore in the mine, when such is liable to happen in the ordinary course of prosecuting the business. *Paule v. Florence Mining Co.*, 80 Wis. 350, 50 N. W. 189.

the servant is of immature years or unable to comprehend the danger.<sup>128</sup>

The rule quite generally prevailing is stated by courts in various forms of expression, yet to practically the same effect. In some cases the proper qualifications of the rule are not stated as fully as they should have been. The statement of the rule generally recognized is that a master is not liable for injuries to an employee resulting from causes open to the observation of such employee, and which it requires no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render.<sup>129</sup>

If it is understood by the expression "open to the observation of the employee," such as he or an ordinarily prudent person situated as he was, would be likely to observe in the exercise of ordinary care, then such statement would undoubtedly be correct. It must, in all cases, be considered as to the opportunity which the employee has for observation, or to know the perils which he may encounter. If called upon to perform a dangerous act or service which must be performed in haste and without an opportunity fairly to observe his surroundings, though otherwise the danger might be apparent, it could not reasonably be said that he should be charged with observing or knowing that which he had had no opportunity to observe or know. It has been stated that where the risks are equally open to the observation of the servant and the master, the former takes upon himself all the risk.<sup>130</sup>

This statement is perhaps too broad. The master and the servant can hardly be said to be on an equal footing in this respect. Their opportunities for observation may not be equal. It is also stated that if a servant undertakes

128. *Reed v. Stockmeyer*, 74 Fed. 186; *Cole v. Chicago & N. W. R. Co.*, 71 Wis. 114, 37 N. W. 85, 5 Am. St. Rep. 201.

129. *Cummings v. Collins*, 61 Mo. 520.

130. *Cummings v. Collins*, 61 Mo. 520; *North Chicago St. R. Co. v. Conway*, 76 Ill. App. 621.

such new service voluntarily, and without protest or objection, that he thereby assumes the risk.<sup>131</sup>

This should be taken with the qualification that he knows, or has the means of knowing of, the perils incident to the new undertaking, which the master knows or is presumed to know.

In such case negligence of the master cannot be predicated upon the ground of the servant being directed to perform a service outside of his regular employment, but the rule to be applied is that relating to his regular employment, and if the circumstances are such that warning or instruction were not required, then the servant assumed the risk.

Of course, if the servant had no knowledge, and was not chargeable with knowledge, of the danger, the risk is not assumed;<sup>132</sup> it being entirely immaterial in such a case whether the work was within or without the scope of the injured servant's employment.

**Master's duty in respect to appliances and place where place of work changed.**

The master being bound to exercise reasonable care to provide a safe place for his servant to perform his work, and to the exercise of reasonable care to keep and maintain the place safe, such duty as to machinery, appliances and place continues when his servant is changed from place to place upon the work in which he is engaged for his master, when the danger of such change is not obvious and the servant is without knowledge of it and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment.<sup>133</sup>

131. *Hogan v. Northern Pacific R. Co.*, 53 Fed. 519; *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280; *Cole v. Chicago & N. W. R. Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201.

132. *Walker v. Lake Shore & M. S. R. Co.*, 104 Mich. 606, 62

N. W. 1032; *Ft. Worth & D. C. R. Co. v. Wrenn*, 20 Tex. Civ. App. 628, 50 S. W. 210; *International & G. N. R. Co. v. Gaitanes*, 70 S. W. (Tex. Civ. App.) 101.

133. *Comben v. Belleville Stone Co.*, 59 N. J. L. 226, 36 Atl. 473. See also *supra* —.

**Rule as stated by Indiana court.**

It was stated that an employee of mature years who is removed from one line of employment and set at work at another without objection, and is then injured while operating machinery with which he is not familiar, or which he does not know how to operate, cannot recover from his employer for such injuries unless his employer knows that he did not know how to operate the machine, or, having informed his employer of his inexperience, the latter failed to instruct him. If a servant is ignorant of the method of operating machinery with which he is to work, it is his duty to inform his employer, and if he conceals his inexperience and undertakes to work with machinery with the operation of which he is unfamiliar, and is injured by reason of his inexperience, the employer is not answerable therefor. Where a servant undertakes to engage in a master's service and to perform certain duties, the master has a right to assume that he is qualified to perform the duties of the position he seeks to occupy, and competent to apprehend and avoid all the obvious hazards of such service; and the same presumption arises where a servant, employed to perform labor in a particular branch or department of a factory, is transferred by the master to another branch or department, and assigned to do other and different work from that for which he was originally employed. It must be presumed that a servant will not undertake to perform labor or operate machinery concerning which he has no knowledge or experience. Hence his willingness to undertake the work is sufficient to warrant the master in assuming that he is competent, unless it is shown that the master knows to the contrary.<sup>134</sup>

As stated, there are courts which lay stress upon the mere fact that the servant is directed to perform a dangerous service outside his regular employment and give force to it in considering the liability of the master in case

134. *Arcade File Works v. Juteau*, 15 Ind. App. 460, 40 N. E.

818, 44 N. E. 326.

3 M. & S.—3

of injury to a servant while thus engaged. Thus it is said: The servant's implied assumption of risk is confined to the particular work or class of work for which he is employed. There is no implied undertaking except as it accompanies and is a part of the contract of hiring between the parties. When the servant voluntarily and without direction from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertakings, and if he is injured he must suffer the consequences. On the other hand, if the servant, by the order of the master, is carried beyond the contract of hiring, he is carried away from his undertaking as to risks. If the master orders him to work temporarily in another department of the general business, when the work is of so different a character and nature that it cannot be said to be within the scope of the employment, and when he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employees. Whether or not the servant may be negligent in obeying such orders will depend upon the facts and circumstances of each particular case. They may show he voluntarily assumed the increased risk, or he may show that he obeyed under threats of discharge or under such circumstances as that he might well expect a discharge if he disobeyed. Hence it is that when a servant is thus, by order of his master, put at work outside of his employment, and is injured by reason of defective machinery, railroad tracks, etc., without his fault, the master is liable regardless of the care he may have exercised to keep them in a safe condition. The master impliedly assures him, not only that he has exercised reasonable care in respect to the safety of the appliances, but that they are in a safe condition and fit for the business for which they are used. This was said in reference to a section hand ordered to couple cars.<sup>135</sup>

135. *Pittsburg C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187.

And again by the same court: When the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But where the apparent danger is not such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed.<sup>136</sup>

The doctrine of the Indiana court was applied where it was alleged that a servant employed to repair cars on special tracks made for that purpose, was injured while performing his usual duties upon another track not specially devoted to such special purpose. In fact, because the work was being performed upon a different track, such work was outside the scope of his employment. It was said: If the master requires of him a service outside of the duties ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious.<sup>137</sup>

Thus, it will be seen, that Indiana is out of line with the decisions of the other states both in holding that the obvious risks are not assumed, and that a risk is not necessarily assumed although equally open to the observation of master and servant, where the work is not within the scope of employment, thus laying down a rule different from that held where the work is within the scope of the employment.

136. *Nall v. Railway Co.*, 129 Ind. 260, 28 N. E. 183; *Cincinnati, H. & I. R. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227.

137. *Louisville, E. & St. L. R. Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187.



And in that state the holding that ordering a servant to do work outside the scope of his employment is an implied assurance of safety of the place and appliances,<sup>138</sup> is not generally held in other jurisdictions and has been expressly repudiated in at least one state.<sup>139</sup>

#### Arkansas.

The rule was stated that where the master orders the servant to work temporarily in another department from that for which he was employed, where the work and the employees are different, such servant assumes the risk of such special employment, unless there are dangers incident to it which in consideration of his known inexperience or of their occult nature the master should have pointed out to him and did not.<sup>140</sup>

#### Federal court.

It was stated when a master commands a servant to go outside of his regular employment to do work, which is attended with special danger, and the servant does the work at the time and in the way directed, the fact that the servant knew the work was dangerous does not exonerate the master or make the servant guilty of contributory negligence, unless the character of the danger be so patent and extreme that no one but a foolhardy, reckless man would attempt it. When, however, the servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work is to be done, but is told to do a particular thing, and has such discretion that he can have the control over the means, time and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he will be charged with contributory negligence.<sup>141</sup>

138. Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187.

139. Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897.

140. Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106.

141. This was said where a repairer was directed to repair a water tank, and his duty was to stand on a platform about twenty-



**Illinois.**

The Illinois court states a rule generally applied in that state, and in Missouri and some other states, to all features of the doctrine of assumed risk, which is, in substance, that where a servant is directed by his foreman to perform a particular service outside the scope of his employment, although the servant has knowledge of the dangers attending such new service, he does not assume the risk unless the danger is such that an ordinary prudent man would not encounter it. He is not bound to disobey on the pain of assuming the risk.<sup>142</sup>

**Maryland doctrine apparently same as in Indiana.**

The Maryland court adopted a statement in an Indiana opinion, as follows: "When, by order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is that when a servant is thus, by order of the master, put at work outside of his employment, and is injured by defective machinery, railroad track, etc., without his fault, the master is liable regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition."<sup>143</sup>

That the employee is thus carried away from his implied agreement to assume ordinary risks is not questioned. There are other risks not ordinary, incident to an employ-

one inches wide, and while performing his duties he slipped and fell, owing to the narrowness of the platform and its icy condition. It was held that the danger was equally obvious to the servant and the master; that the act was apparently reckless in the absence of his taking the precautions open to him for his safety, and that it did not appear that the means and manner of doing the work, that is, of providing for his safety, were within his discretion. *English v. C. M. & St. P. R. Co.*, 24 Fed. 906.

142. *Dallamand v. Saaffeldt*, 175 Ill. 310, 51 N. E. 645, 67 Am. St. Rep. 214, 48 L. R. A. 753; *Chicago, R. I. & P. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 110.

143. The court held that where a lad of thirteen was put to work at a machine contrary to the express terms of his employment, made with his mother, he did not assume the risk of injury from such source. *National Enameling & Stamping Co. v. Brady*, 93 Md. 646, 49 Atl. 845.

ment, which are assumed by the employee, where obvious or known, and the only question, where they are incurred in other than the servant's regular employment, is that which is involved in the regular employment, whether to a mind like his, under the circumstances, they are obvious and should be known, or are in fact known by him.

#### **Michigan.**

An employee, by his contract of employment, assumes the risks of injury which are properly incident to his employment and about which he may inform himself by observation, but when, by direction of the master, he is engaged in work outside the scope of his regular employment, the most that can be said is that he may be negligent in undertaking work which is obviously dangerous to any one of his experience and intelligence.<sup>144</sup>

#### **Concise statement of rule.**

A better and more concise statement of the rule is that if the servant is familiar with the dangers attending such temporary service, and voluntarily attempts to perform the service, then the risk is one which he assumes.<sup>145</sup> So where the danger is plain, open and apparent to his mind.<sup>146</sup>

And if the duties of the new work does not require him to expose himself to increased danger, he is not excused from assumption of the risk by the mere fact of change in the service.<sup>147</sup>

#### **Doctrine summarized.**

In 1894 the author had occasion, upon a review of the authorities and consideration of the principles involved in the general subject, to state his conclusions which were soon thereafter approved by the Supreme court of Michigan (*Gavigan v. Lake Shore & M. S. R. Co.*, 110

144. *Johnson v. Desmond Chemical Co.*, 152 Mich. 84, 115 N. W. 1043.

145. *Consolidated Stone Co. v. Redmon*, 26 Ind. App. 31, 55 N. E. 454, 84 Am. St. Rep. 278.

146. *Chicago, R. I. & P. R. Co. v. Kinnare*, 190 Ill. 9, 60 N. E. 57; *Worthington v. Goforth*, 119 Ala. 44, 26 So. 531.

147. *Morewood v. Smith*, 25 Ind. App. 264, 57 N. E. 199.

Mich. 74, 67 N. W. 1097) and since have been quite generally approved by other courts. The following is a statement of such conclusions and the reasoning upon which they were based.

“While great stress is laid in some cases upon the fact that the risk has been increased, as well as, in other cases, that the servant was injured while in the performance of a hazardous act outside of his general employment, yet it is difficult to ascertain that any special importance is to be attached to that fact alone, any further than that the risks of the general employment, thus increased, are not assumed as risks incident to the employment, and therefore knowledge thereof, actual or presumed, must be shown by the master, unless they are such as are obvious, requiring no special knowledge or skill to understand or appreciate. If such dangers are not obvious, and the employee can not be presumed to understand or appreciate them, then he must be warned and instructed. I know of no rule, that where the servant fully understands and comprehends the danger of an increased risk attendant upon a temporary or occasional act of service, and he performs the act, or attempts to do so, the master is liable for the injury he may sustain, merely upon the ground of such increased risk, or risk attending such temporary employment. The liability in these, as in other respects, is made to depend upon the knowledge and experience of the servant, and the warning and instructions given, where any such are by law required. The rule has been stated that if, while in the performance of such a temporary service, the servant’s opportunities for observing the danger was equal to that of the company, or if he was required to perform an unusually dangerous service for good reasons, as for the safety of passengers, then the master cannot be said to have been negligent.”<sup>148</sup>

148. In *Jones v. Lake Shore, M. R. Co.*, 49 Mich. 573, 14 N. W. 551, from the report of the case, it might be understood that the mere

fact of being required to perform other duties than such as were properly embraced in his contract, would impose a liability upon the

**Where peril increased temporarily.**

Where the perils of an employment are increased temporarily, it cannot be said that the servant assumes the risk or should demand their removal. Hence, when a shaft had been put in a room over night, where many

master to respond in damages for injury the servant might sustain while so engaged. Yet such could not have been intended by the court, but, rather, the ground for recovery was within the principles stated in *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 204. In fact, the court so state: 'There the recovery proceeded upon the ground of directing an inexperienced lad, who did not comprehend the danger, to perform the hazardous duty of applying brakes to moving cars. The same position was taken by counsel in *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201, to-wit: That the mere direction of the master to perform such temporary and dangerous work is negligence on the part of the master sufficient to sustain an action of the employee so injured in the performance of such work while he is using ordinary care on his part. The court say: "We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities, nor by the general rules of law which define the relations of employer and employee. Some of the cases cited may have some general statements which give some countenance to the rule as stated by counsel; but when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanc-

tioned by the courts." The court further state that negligence of the master cannot be predicated simply on the fact that he directed his employee to do the work; that in every case of negligence the evidence must show some violation of duty on the part of the master. No case can be found where it had been held that the mere fact that the employer requested his employee to perform a temporary work outside of his ordinary employment was a violation of any duty which he owed to his employee. If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the servant so directed has not the requisite knowledge or skill for doing the work with safety, and such want of skill is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the master to do the work might be justly held to be a violation of duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. The Wisconsin court reviews many leading cases upon the subject, including those relied upon by the respondent's counsel, and asserts that none sustain the position contended for by such counsel. The court further say that they are not called upon to decide what the rule would be if the em-

girls were employed, it being extra dangerous by reason of its height, the master intending to remedy the defect as soon as there was time, and one of such girls was killed by her clothing getting caught in the shaft, it was held the master was liable.<sup>149</sup>

**Temporary work, latent dangers.**

Where one employed as a blacksmith was suddenly called from his shop to assist in hoisting and placing in position a large and heavy smokestack, without an opportunity to examine the arrangement for doing the work, the material question was said to be whether he had sufficient knowledge to understand the hazards of the extra work, and therefore a proper question for the jury was whether, in the mode adopted for hoisting, there was required peculiar skill or knowledge to perform it with safety, though his part of the work was merely to pull on the rope. The rule of law was stated to be that when a servant is ordered by his master to do work outside the scope of his employment, and bringing him in contact with a different class of fellow-servants, the latent risks incident to the new work are as to him extra hazards because additional to the risks of his regular duties.<sup>150</sup>

**Employee, inexperienced, directed to do an extra hazardous act.**

Where it was alleged that a servant was employed as a common laborer about defendant's freight house and

ployee, when ordered to do such temporary work, objected on account of his want of experience and knowledge, and, notwithstanding such declaration, his employer insisted upon it, and thereupon he undertook to do the work after such protest, rather than subject himself to the risk of being discharged from his employment. They neither approve or disaffirm the rule stated in *Leary v. Railroad Co.*, 139 Mass. 587, 2 N. E.

115, 52 Am. Rep. 733. The weight of authority, as stated in the note to *Cole v. Railway Co.*, is that the mere fact of objection and protest by the employee, the conduct of the master not amounting to coercion, does not change the rule; and many cases are cited.

149. *Fairbanks v. Haentzche*, 73 Ill. 236.

150. *Consolidated Coal Co. v. Hannie*, 146 Ill. 614, 35 N. E. 162.

yards, specially for loading and unloading freight cars, and while so employed was ordered by the superintendent or foreman of the defendant, who had the management, direction and supervision of the business and affairs of the company about the depot, to couple a car to others in a train, and such servant was unskilled and inexperienced in such work, as such foreman well knew, and such servant was killed by being crushed between the cars, caused by the negligent manner in which the engine was handled, it was said that when a person in the employment of another, in the performance of a specific line of duty only ordinarily hazardous, is commanded by a fellow-servant, but to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, but different from the sphere of employment in which he had been engaged to serve, and extra hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same the servant so directed receives injuries occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant injured.<sup>151</sup>

#### Effect of fear of discharge.

The fact that the order is obeyed because of fear of losing one's job does not affect the assumption of risk.<sup>152</sup>

#### Question ordinarily one of fact.

It has been held that clear, explicit and uncontradicted proof is required to show an assumption of risk of danger, as matter of law, in a temporary employment outside of the regular employment of the servant. Evi-

151. *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401, 4 Am. Rep. 616.

152. *Wormell v. Maine Cent. R. Co.*, 79 Me. 397, 10 Atl. 39, 1 Am. St. Rep. 321; *Leary v. Boston & A. R. Co.*, 139 Mass. 580, 2 N. E. 115,

52 Am. St. Rep. 733; *Gavigan v. Lake Shore & M. S. R. Co.*, 110 Mich. 71, 67 N. W. 1097. But see *Jones v. Lake Shore & M. S. R. Co.*, 49 Mich. 573, 14 N. W. 551.

dence based merely upon inference and presumption, and not necessarily proving knowledge of the special danger by the servant, raises only a question of fact.<sup>153</sup>

**§ 757. Ordering minor to perform more dangerous work.**

The fact that a minor is put to work at a more dangerous class of work, outside the scope of his duties, does not necessarily render the master liable, but it depends on whether the servant was warned and whether he had sufficient capacity to understand the dangers.<sup>154</sup>

153. *Danbert v. Western Meat Co.*, 135 Cal. 144, 67 Pac. 133.

154. A boy fourteen years old was employed to work about an elevator in a mill. Subsequently he was set at work at a picking machine, a more hazardous employment, when he was injured. The contention on the part of the plaintiff was that this of itself was sufficient to warrant a recovery, without reference to whether the act of changing his work was a negligent or prudent thing to do. It was said: This proposition is wrong. In the case of an adult the employer would not be liable if such adult knew the risks, and the rule is the same as to minors if they have sufficient capacity to avoid the danger and know the danger to be avoided. Putting a minor to work becomes a matter of discretion and care to be exercised with reference to such circumstances, and the employer can only be held liable when he does not exercise such discretion and care; that is, when he is negligent. *Anderson v. Morrison*, 22 Minn. 274.

ORDERED BY SUPERIOR TO PERFORM EXTRA HAZARDOUS ACT. It was said that the presumption that a minor takes upon himself the

risks incident to the undertaking cannot arise when the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. This was said where a boy of tender years, employed as helper on a machine and under the control of another employee, was directed by his superior to ascend a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt, and while making the effort his arm was caught and torn from his body. It was further said that if the person had been of mature years it might, with some plausibility, be argued that he should have disobeyed it, and he must have known its execution was attended with danger, or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. The boy, not being able to judge for himself, had a right to rely upon the judgment of the superior who directed him. *Union Pac. R. Co. v. Fort*, 17 Wall. 553. Where a young boy was ordered by a foreman having control over him, to perform the dangerous service of oiling a machine while in motion, which work was outside of



If the servant is of tender years and inexperienced, and is ordered to do work outside the scope of his duties, and the work is such that a prudent master would

the employment for which he was engaged, and he was injured while so engaged, it was held an act of negligence on the part of the foreman, for which the master was responsible, to order the boy to perform such a dangerous service; that in such a case the doctrine of fellow-servant had no application; that the act required to be done, being beyond the scope of the boy's employment, under the circumstances could not be said was a risk assumed. The court approved *Railroad Co. v. Fort*, 17 Wall. 553, and distinguished *Gartland v. Railroad Co.*, 67 Ill. 498. *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618.

**ACTING UNDER DIRECTION OF CONDUCTOR.** Where a youth nineteen years old, employed as a laborer in connection with the operation of a construction train, was directed by the conductor thereof to set brakes upon such train, and was killed while attempting the act, it was held that it was immaterial whether the direction of such servant to perform the act was or was not within the conductor's instructions, so long as the servant was within his control and subject to his direction in and about the work he was employed to do; that the servant was not called upon to disobey the order or assume the risk; that such work on the part of the boy was beyond the scope of his employment. It was subsequently said in *Wheeler v. Berry*, 95 Mich. 250, 54 N. W. 876, that if the plain-

tiff had been a man of age and experience with the work, it was clear that a recovery could not have been sustained. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. This case is out of line with the great weight of authority.

**CALL BOY ACTING UNDER ORDER OF YARD FOREMAN.** Where a minor who was employed by the defendant as call boy in its yard office, whose duties among others was to deliver messages to different departments in the yard, was, while on a train with a message, requested by the yard foreman to uncouple a car, and in obeying was injured, it was held he could not recover; that he was under no obligation to obey the foreman; that he was a mere volunteer. *Texas & N. O. R. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

**ERRAND BOY DIRECTED TO REMOVE GIANT POWDER FROM FIRE.** Where a boy was employed by contractors, who were engaged in railroad grading, as a water and errand boy, and he was ordered by the gang boss to remove a stick of giant powder from a fire, where it was burning, having been placed there to thaw, and was killed by an explosion, it was said that as a general rule a person entering into the employ of another is held to assume its ordinary risks; but if a boy of fifteen years of age is engaged to work in an un Hazardous service, and is placed by the employer under the control of the gang boss, and such gang boss orders him to



not have imposed upon a person of his years, strength, and judgment, the master is liable although he fully warned and instructed the servant.<sup>155</sup>

**§ 758. Custom to obey orders outside of line of regular duty.**

Where a person, employed as a watchman to a pile driver train and engine, was injured by the explosion of the boiler, and the question was raised that, at the time of his injury, he was engaged in a line of duty outside the scope of his employment, at the request of his immediate superior, it was said that if the plaintiff was subject to the control of such superior, and was ordered by him to go with the engine and he obeyed, although it was not in the line of his duty as watchman, and if it was customary in the company's service to obey orders to do duty outside of their regular employment, then the plaintiff was on duty while attending the engine.<sup>156</sup>

do a thing in its nature hazardous to life and limb and outside the duties of the boy, but within the scope of the employment and duties of the boss, and in the attempt to perform such act the boy is thereby killed, then the giving of such orders is negligence chargeable to the master. *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

**CHANGED TO MORE DANGEROUS POSITION.** Where a boy was employed in a mine with his father's consent in a certain capacity, and was afterwards, without such consent, changed to another less safe position, and was killed, it was held the risks of the latter were not assumed. The action was brought in the name of the parents. *Weaver*

*v. Iselin*, 161 Pa. St. 386, 29 Atl. 49.

155. The facts were that a boy fourteen years old, employed as a helper in a spinning room, whose duties were to sweep the floor, pick waste and occasionally to oil some parts of the machinery when not in motion, was directed to go to the top of a step ladder, and hold the belt away from a revolving shaft, and was caught by the belt and injured. *Hayes v. Calchester Mills*, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915. To same effect, *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 353.

156. *East Line & R. R. Co. v. Scott*, 68 Tex. 694, 5 S. W. 501; same case, 72 Tex. 70, 10 S. W. 298, 10 Am. St. Rep. 804.

## CHAPTER V.

## FAILURE OF SERVANT TO GIVE NOTICE OF DEFECTS OR NEGLIGENCE.

Sec.

759. Statutes.

760. Effect.

761. Knowledge of master or superior servant.

Sec.

762. Of what defects notice must be given.

763. To whom notice must be given.

## § 759. Statutes.

At common law, in a majority of the states, if the master is negligent but the servant, with knowledge thereof, continues in the employment without objection, and is afterwards injured by reason of such negligence, he cannot recover because he is deemed to have assumed the risk. This rule has been by some jurists considered unfair to the injured employee, and in some states there are statutes or constitutional provisions expressly declaring that such knowledge shall not bar a recovery.<sup>157</sup>

In other jurisdictions, there are statutes which say that such continuance in the employment shall not constitute negligence "as matter of fact or as matter of law."<sup>158</sup>

And in several states, including Alabama, Massachusetts and New York, where knowledge of the defect or negligence is declared by statute not to constitute an assumption of risk, the statute provides a new defense for the master in lieu, at least in part, of the defense of assumed risk. This new defense is that (1) plaintiff knew of the defect or negligence; (2) defendant or his servants superior to plaintiff did not know thereof; and (3) that plaintiff gave no notice of such defect or negligence to defendant or a superior servant.<sup>159</sup>

157. See *supra*, § —.

158. Laws N. Y. 1910, c. 352, amending in this respect § 202 of the Labor Law which prior there-

to made the question in such a case one of fact.

159. The statutes generally provide that if the servant or employee

§ 760. Effect.

The effect of these statutory provisions is to create a new defense which the master may interpose,<sup>160</sup> and the burden of proving which rests on him.<sup>161</sup>

§ 761. Knowledge of master or superior servant.

If the master or superior servant knows of the defect or negligence, and the injured servant knew the one or the other had such knowledge, failure to give notice is no defense.<sup>162</sup>

And under most of the statutes knowledge on the part of the master or superior servant precludes the necessity for notice, irrespective of whether the injured servant knew or did not know that the one or the other was possessed of such knowledge.<sup>163</sup>

The decision of a trial court that the knowledge of the defect on the part of the employer or superior servant must be personal or actual knowledge and not constructive notice, was overruled on the theory that an employer is presumed to know his own acts.<sup>164</sup>

§ 762. Of what defects notice must be given.

This statutory provision does not require notice of latent defects of which by reason of their character the servant may be ignorant until injured thereby.<sup>165</sup>

knew of the defect or negligence causing the injury but failed in a reasonable time to give information thereof to the master or to some person superior to himself engaged in the service or employment of the master, the master is not liable unless the master or such superior already knew of such defect or negligence.

160. *Connolly v. Waltham*, 156 Mass. 368.

161. *Id*; *Murphy v. Marston Coal Co.*, 183 Mass. 385; *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257.

162. *Keating v. Coon*, 102 App. Div. 112, 92 N. Y. Supp. 474.

163. *Consol. Laws N. Y. 1909*, c. 36, § 202, as amended by *Laws 1910*, c. 352; *Anderson v. Milliken Bros.*, 108 N. Y. Supp. 61.

164. *Johnson v. Onondaga Paper Co.*, 98 N. Y. Supp. 602, where pulley put up eight days before the accident by some one in the employ of the company, but it was claimed to have been done without the knowledge of the company.

165. *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257; *Murphy v. Marston Coal Co.*, 183 Mass. 385.

So knowledge of the existence of certain things by the servant does not necessarily imply that the servant, before his injury, knew that such things were a "defect" within the statute, although in some instances such knowledge might be imputed from the common experience of mankind.<sup>166</sup>

**§ 763. To whom notice must be given.**

Under the Alabama statute, notice need not be given to the master or "some person intrusted by the master with the duty of seeing that his ways and plant are in proper condition", but it is sufficient to give notice to the master or "some other person superior" to the injured servant in the employ or service of the same master.<sup>167</sup>

166. *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257.

167. *Cahaba Southern Min. Co. v. Pratt*, 146 Ala. 245, 40 So. 943. But it was held in Alabama in an earlier case that a servant under

this statute must either notify the master himself or the employee whose duty it is to see that the appliance in question is kept in proper condition. *Thomas v. Bellamy*, 126 Ala. 253, 28 So. 707.

## BOOK IV.

### EVIDENCE.

#### Chapter

- I. GENERAL CONSIDERATIONS, §§ 764, 765.
- II. BURDEN OF PROOF, §§ 766-772.
- III. ADMISSIBILITY OF EVIDENCE, §§ 773-792.
- IV. CHARACTER AND SUFFICIENCY OF EVIDENCE, §§ 793-797.

#### CHAPTER I.

##### GENERAL CONSIDERATIONS.

###### Sec.

764. Scope of treatment.

765. Presumptions in general.

###### Sec.

Presumption that injured servant was not negligent.

#### § 764. Scope of treatment.

It is not within the scope of this work to state or discuss the general principles underlying the laws of evidence, but merely to direct attention to the application of those certain rules of evidence which particularly apply to the several matters embraced within this work.

#### § 765. Presumptions in general.

The question of presumptions has been considered to some extent in connection with the question as to the burden of proof. For instance, it has been stated that the negligence of neither plaintiff nor defendant will ordinarily be presumed, but on the contrary it will be presumed that they were in the exercise of due care at the time of the accident. In this connection it is necessary to always keep in mind the difference between rebuttable

and nonrebuttable presumptions, the former being the ordinary ones encountered in connection with the law relating to master and servant.

Involved in the general subject are questions of presumptions at almost every stage, and their force and effect has been stated in considering the different elements. Hence it is unnecessary to repeat them here at any length. The presumption is that the appliances furnished are suitable and proper. When shown to be defective, the presumption in most states is that the servant did not have knowledge thereof.<sup>1</sup>

The presumption is that the master has exercised proper care in the selection of the servant.<sup>2</sup>

The servant has a right to presume that the master will do his duty.<sup>3</sup>

The negligence of the defendant, however, cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person injured or killed. It must be overcome by direct evidence. One presumption cannot be built upon another.<sup>4</sup>

It is presumed that the master, or the person placed in charge of a hazardous business or department thereof, is familiar with the dangers ordinarily accompanying the business he has in charge.<sup>5</sup>

A person of apparently sufficient age and physical ability and mental caliber is presumed to be competent to perform the duties of the position he seeks and competent to apprehend and avoid all dangers that may be discovered by ordinary care and prudence.<sup>6</sup>

1. *Eliot v. Kansas City F. & S. M. R. Co.*, 204 Mo. 1, 102 S. W. 532.

2. *Hills v. Railway Co.*, 55 Mich. 440, 21 N. W. 878.

3. *Russell v. Railway Co.*, 32 Mich. 230, 20 N. W. 147; *Gibson v. Railway Co.*, 46 Mo. 163, 2 Am. Rep. 497.

4. *Looney v. Metropolitan Ry. Co.*, 200 U. S. 480; *Douglas v.*

*Mitchell*, 35 Pa. St. 440; *Phil., etc., R. Co. v. Henrice*, 92 Pa. St. 431; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570.

5. *Smith v. Penninsular Car Works*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542.

6. *Pittsburg, C. & St. L. R. Co. v. Adams*, 105 Ind. 152, 5 N. E. 187.

So it may be stated as a rule that an employee is presumed to know as much about the subject as may be observed by a person having a reasonable degree of experience in the employment upon which he enters;<sup>7</sup> and is presumed, where a defect is obvious and suggestive of danger, to have knowledge thereof,<sup>8</sup> as when the dangers are the subject of common knowledge.<sup>9</sup>

When it is not shown but that due care was exercised in the choice of a servant, no presumption of the latter's unfitness arises afterwards. The presumption is that if competent and fit when he enters the service, he remains so.<sup>10</sup>

**Presumption that injured servant was not negligent.**

The law out of regard to the instinct of self preservation, will presume *prima facie* that a person who has suffered death by a railroad accident, was, at the time of the accident, in the exercise of due care and the presumption is not overthrown by the mere fact of the injury.<sup>11</sup>

Thus, there being no evidence tending to show the purpose for which a brakeman went upon the track, the presumption is that it was for a purpose consistent with due care, rather than the contrary.<sup>12</sup>

7. *Lyttle v. Chicago & W. M. R. Co.*, 84 Mich. 280, 47 N. W. 573.

8. *Wedgewood v. Railway Co.*, 41 Wis. 478.

9. *Smith v. Penninsular Car Works*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Stephenson v. Duncan*, 73 Wis. 405, 41 N. W. 337, 9 Am. St. Rep. 806; *Ft. Wayne,*

*J. & S. R. Co. v. Gildershoe*, 33 Mich. 133.

10. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243. See also *supra*, vol. 1.

11. *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124, 77 N. W. 1016.

12. *Jones v. Flint & P. M. R. Co.*, 127 Mich. 198, 86 N. W. 838.

## CHAPTER II.

## BURDEN OF PROOF.

Sec.		Sec.	
766.	Negligence of defendant. Presumption of due care on part of employee does not change burden. Particular facts. Proof of injury alone. Rule of res ipsa loquitur as changing burden.		United States Courts. Vermont. Virginia. Washington. West Virginia. Wisconsin.
767.	Negligence of defendant as cause of injuries.	769.	Contributory negligence. Alabama. Arizona. Arkansas. California. Colorado. Connecticut. Delaware. Florida. Georgia. Idaho. Illinois. Indiana. Iowa. Kansas. Kentucky. Louisiana. Maine. Maryland. Massachusetts. Michigan. Minnesota. Mississippi. Missouri. Montana. Nebraska. New Hampshire. New Jersey. New York. North Carolina. Ohio. Oregon. Rhode Island. South Carolina. Texas. Utah.
768.	Assumed risk. Arkansas. Alabama. California. Colorado. Connecticut. Delaware. Florida. Georgia. Idaho. Illinois. Indiana. Iowa. Kentucky. Louisiana. Maine. Michigan. Minnesota. Missouri. Montana. Nebraska. New Jersey. New York. North Carolina. Ohio. Oregon. Rhode Island. South Carolina. Texas. Utah.		



Sec.		Sec.	
	South Carolina.		West Virginia.
	Tennessee.		Wisconsin.
	Texas.		Utah.
	United States Courts.	770.	Fellow-servants.
	Vermont.	771.	Relationship of parties.
	Virginia.	772.	Rule in Georgia.
	Washington.		

### § 766. Negligence of defendant.

The burden of proof to show negligence on the part of defendant is on plaintiff.<sup>13</sup>

In all cases where it is alleged that an injury was occasioned an employee by or through the negligence of the master or one for whose negligence he is responsible, the burden is upon the party alleging negligence to affirmatively establish it by a fair preponderance of the evidence. If he establishes a *prima facie* case and no proof is offered to the contrary, he should prevail. Therefore, the other party, if he would avoid the effect of such *prima facie* case, must produce evidence of equal or greater weight,

13. This proposition is so elementary that it is deemed wholly unnecessary to cite all the multitude of cases so holding. See *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. It seems that the Nebraska court held that proof of the defect is evidence of negligence and that the burden after such proof is upon the defendant to show want of negligence. Thus where a station agent was injured in the attempt to set a defective brake, it was said that if the brake became out of repair a short time before the accident, the contention that the company had no notice of it, and could not by the exercise of ordinary care have discovered it before the accident are matters

of defense. *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 299, 74 N. W. 627. Subsequently, upon a rehearing, the court state that they did not intend to be understood as holding the burden was upon the defendant to show want of knowledge and state the burden is upon the plaintiff. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462. An employee injured by the explosion of a boiler was held to have the burden of showing that the boiler was unfit for the use to which it was applied, and that the explosion was owing to particular defects pointed out. *Texas & Pacific R. Co. v. Thompson*, 71 Fed. 531; *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228, 33 Atl. 1104

to balance or control it. Still the proof upon both sides applies to the affirmative or negative of one and the same proposition, and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift though the weight of either scale may at times preponderate.<sup>14</sup>

The plaintiff must prove something which at least warrants an inference of negligence on the part of the defendant and cannot base his case upon facts just as consistent with care and prudence as the opposite.<sup>15</sup>

And where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent, as held by many courts of high standing and ability, to leave the matter to the jury, since in such case the party who affirms negligence has failed to establish it.<sup>16</sup>

The cause of injury being thus left in doubt, is not proved, and hence cannot be attributed to the defendant's negligence or fault.<sup>17</sup>

The plaintiff being required to negative the presumption in favor of the defendant of the exercise of due care, it is not enough that he show an injury sustained, but he must go further and show some specific act of negligence.<sup>18</sup>

Thus where the cause of a car dumping while in motion was unexplained and was as consistent with the failure of co-employees to properly secure and fasten the hooks which held it in place, as of neglect of duty in inspecting and keeping the car in repair, there being no defect in the car to which the accident might be attributable, the

14. Powers v. Russell, 13 Pick. 26; Klunk v. Hocking Valley R. Co., 74 Ohio St. 125, 77 N. E. 752; Galloway v. Chicago, R. I. & P. R. Co., 234 Ill. 474, 84 N. E. 1067; Brownfield v. Chicago, R. I. & P. R. Co., 107 Ia. 354.

15. Hayes v. Railroad Co., 97 N. Y. 259; Baulie v. Railroad Co., 59 N. Y. 357, 17 Am. Rep. 325;

Railroad Co. v. Schartle, 97 Pa. St. 450, 2 Am. & Eng. R. Cases 158.

16. Cotton v. Wood, 8 C. B. (N. S.) 568; Thompson on Negligence p. 364. See also *infra*, § 795.

17. Saner v. Union Oil Co., 43 La. Ann. 699, 955, 9 So. 566.

18. Soderman v. Kemp, 145 N. Y. 427, 40 N. E. 212.

plaintiff's case against the company for injuries sustained, was not proven.<sup>19</sup>

An instruction that "where the employee is injured through any appliance or surroundings of the business, and it does not appear that the employee was at fault, the burden is on the employer to show that he himself was free from fault," was held error and the rule was said to be that the plaintiff must in the first instance prove enough to show a fair preponderance of negligence and of resulting injury to himself.<sup>20</sup>

It was said that where a cause of action is shown which might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in the absence of showing any other cause, that the one known was the operative agency in bringing about such result.<sup>21</sup>

Where, however, an accident may be attributed to two or more causes only one of which can be chargeable to the neglect of the master, the burden is upon the plaintiff to show the real cause.<sup>22</sup>

**Presumption of due care on part of employee does not change burden.**

The presumption that the deceased was in the exercise of due care, where in an accident he received injuries resulting in his death, there being an absence of witnesses to the accident, which is applied by some courts where the question of his contributory negligence is involved, does not relieve the plaintiff, in an action against the employer to recover damages therefor, from proving defendant's negligence, and that such negligence was the cause of the death.<sup>23</sup>

19. *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212.

20. *Lindall v. Bode*, 72 Cal. 245, 13 Pac. 660.

21. *Rase v. Minneapolis St. P. & S. S. M. R. Co.*, 107 Minn. 260, 120 N. W. 360.

22. *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432, 101 N. W. 183.

23. *Powers v. Pere Marquette R. Co.*, 143 Mich. 379, 106 N. W. 1117. See also *Looney v. Metropolitan R. Co.*, 200 U. S. 480.

**Particular facts.**

It follows from the general rule that plaintiff must show that defendant failed to exercise ordinary care, that he must show as an element thereof that the master knew or should have known of the defect, omission or condition causing the injury.<sup>24</sup>

If the alleged negligence consists in furnishing defective appliances, plaintiff must prove that they were in fact defective, and that defendant knew or ought to have known of the defect. So, whatever negligence is relied on, whether the furnishing of an unsafe place to work, or unsafe appliances, or the failure to instruct and warn, or the failure to make and promulgate rules, or negligence in selecting an incompetent co-servant, the burden is on plaintiff to prove sufficient facts to show the negligence of defendant in that particular. For instance, if negligence in employing or retaining the alleged negligent co-servant is relied on, the burden is on plaintiff to show (1) that the servant was in fact incompetent; (2) that defendant knew or should have known of such incompetency, and (3) that the incompetency was the proximate cause of the injury.<sup>25</sup>

However, a recovery is not precluded because the particular defect or omission causing the accident is not specifically pointed out.<sup>26</sup>

**Proof of injury alone.**

It is well settled that the fact of the injury ordinarily carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been

24. *Ohio & M. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687; *Williams v. St. Louis & S. F. R. Co.*, 119 Mo. 316, 24 S. W. 782; *Hudson v. Charleston, C. & C. R. Co.*, 104 N. C. 491, 10 S. E. 669.

25. See volume 1.

26. *Mooney v. Connecticut*

*River Lumber Co.*, 154 Mass. 407, 28 N. E. 352; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343. An employee injured by defective machinery need not show the precise nature of the defect. *Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868.

guilty of negligence;<sup>27</sup> and in this respect the law is different from the case of a passenger injured by a common carrier.

**Rule of *res ipsa loquitur* as changing burden.**

The rule of *res ipsa loquitur*, as explained hereafter,<sup>28</sup> does not change the burden of proof. It still remains with the plaintiff to establish negligence by a preponderance of evidence. But he may offer the fact of the accident as some evidence of negligence.<sup>29</sup>

**§ 767. Negligence of defendant as cause of injuries.**

Plaintiff has not only the burden of proving the negligence of defendant but must also prove that such negligence was the cause of his injuries.<sup>30</sup>

27. *Patton v. Texas & P. R. Co.*, 179 U. S. 658; *Louisville & N. R. Co. v. Allen's Admr.*, 78 Ala. 794; *Short v. New Orleans & N. E. R. Co.*, 69 Miss. 848, 13 So. 826; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, 27 Pac. 371; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83; *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Smith v. Memphis & L. R. R. Co.*, 18 Fed. 304.

28. See *infra*, § 797.

29. *Morrisett v. Elizabeth City Cotton Mills*, 151 N. Car. 31, 65 S. E. 514, holding that if no other evidence is offered, the jury may find for or against plaintiff as they see fit.

30. *Walker v. Louis-Werner Sawmill Co.*, 76 Ark. 436, 88 S. W. 988; *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Trigg v. Ozark Land & Lumber Co.*, 187 Mo. 227, 86 S. W. 222; *Bowers v. Bristol Gas & Electric Co.*, 100 Va. 533, 42 S. E. 296; *Cotton Mills*, 138 N. C. 169, 50 S. E. 561; *Illinois Central R. Co. v. Cathey*, 70

Miss. 332, 12 So. 253; *Neeley v. Southwestern Cotton Seed Oil Co.*, 130 Kl. 356, 75 Pac. 537, 64 L. R. A. 145. The trial court having charged: "It is contended on the part of the plaintiff, that the failure to give proper warning, and instruction to the plaintiff, was the proximate cause of the injury; on the part of the defendant, however, this is denied, and it is contended that this was not the proximate cause of the injury, but the proximate cause of the injury was the boy's own negligence and carelessness. It is for you to determine what the fact was. The burden of proof on this question is on the defendant." The supreme court held that the question here mentioned did not refer to the contributory negligence of the defendant, but to the question whether the lack of warning was the proximate cause of plaintiff's injury, and hence was error, because the plaintiff always has the burden of showing that the negligence com-

So where the negligence of a fellow-servant for which the master is not liable concurs with the negligence of the master, the burden is on plaintiff to show that the master's negligence was the proximate cause of the injury.<sup>31</sup>

**§ 768. Assumed risk.**

In most jurisdictions the burden of proving that the injured servant assumed the risk is on defendant, but in some states the burden is on plaintiff to show that he did not have knowledge of the risk. But even in those jurisdictions where the burden is on defendant, yet where defendant shows knowledge of the risk on the part of plaintiff, he cannot recover unless he meets the burden of showing that he comes within some exception to the general rule of assumed risk.<sup>32</sup>

In a few cases the court has clearly distinguished between "ordinary" and "extraordinary" risks so far as burden of proof is concerned. It is said as to the former that if plaintiff merely proves that the injury sustained was caused by some risk ordinarily incident to the employment, he fails to recover because he has failed to prove negligence; but if the risk is an "extraordinary" one, i. e., one arising from the negligence of the employer, then the defense of assumed risk is an affirmative one which must be pleaded and proved by defendant.<sup>33</sup>

Inasmuch as the burden in respect to whether an employee assumed the risk of injury in a particular case, is not the same in all jurisdictions, the matter will be considered by states. In some courts the rule governing contributory negligence is applied, and the burden is cast upon the plaintiff to negative assumption of the risk, while in others the burden is upon the defendant to show that the

plained of was the proximate cause of the injury. *Schumacher v. Tuttle Press Co.*, 142 Wis. 631, 126 N. W. 46.

31. *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205.

32. In support of last statement,

see *Ford v. Chicago, R. I. & P. R. Co.*, 106 Ia. 85, 71 N. W. 332.

33. *Martin v. Des Moines Edison Light Co.*, 131 Ia. 724, 106 N. W. 359; *Tucker v. Northern Pac. T. Co.*, 41 Oreg. 82, 68 Pac. 426. To same effect, *Mace v. Boedker & Co.*, 127 Ia. 721.

risk was assumed. In some other jurisdictions, the burden is cast upon the defendant to show the risk was assumed, although the burden is upon the plaintiff in respect to his contributory negligence.

**Arkansas.**

Where a servant is injured in consequence of the negligence of the master, the latter, in order to show that the servant assumed the risk, must prove that the servant voluntarily subjected himself to the new danger with full appreciation thereof.<sup>34</sup>

**Alabama.**

The burden of proving knowledge on the part of plaintiff is on defendant.<sup>35</sup>

**California.**

It is not necessary in California for the plaintiff to aver or prove that he himself was without fault or that he did not have knowledge of the defect in the appliance.<sup>36</sup>

The burden is upon the defendant to show that the employee either knew or should have known of the defects in or their condition.<sup>37</sup>

**Colorado.**

The burden of proving knowledge of the danger on the part of the employee is on the employer.<sup>38</sup>

**Connecticut.**

Inasmuch as it is held that the complaint must show that the risk was not assumed,<sup>39</sup> it is probably true that the burden is on plaintiff.

34. Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. 837, n. s.

35. See Southern Car & Foundry Co. v. Jennings, 137 Ala. 247, 34 So. 1002; E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206, 37 So. 445.

36. Magee v. N. P. C. R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; Robinson v. Western Pac. R. Co., 48 Cal. 209; Mc-

Quiken v. Central Pac. R. Co., 50 Cal. 7.

37. Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410; Bjorman v. Fort Bragg Red Wood Co., 104 Cal. 626, 38 Pac. 451.

38. Williams v. Sleepy Hollow Min. Co., 37 Colo. 62, 86 Pac. 337, 7 L. R. A. 170, n. s.

39. Elie v. Cowles & Co., 82 Conn. 236.

**Delaware.**

Inasmuch as it is held that the defense need not be negatived, it is assumed that the burden of proof is on defendant.<sup>40</sup>

**Florida.**

Assumption of risk is an affirmative defense to be specially pleaded and proved by defendant.<sup>41</sup>

**Georgia.**

A declaration under the common law in an action by an employee against the master for injuries received in the employment, must allege not only that the servant was ignorant of the defect, but also that he could not have discovered it by ordinary diligence, and that the master knew or ought to have known of it.<sup>42</sup>

In other words, the burden of proving the risk was not assumed is on plaintiff. The rule under the statutes as amended in 1909, where defendant is a railroad company, is considered hereafter.<sup>43</sup>

**Idaho.**

Before the servant can recover he must show that the injury did not arise from a defect obvious to himself or which in the exercise of ordinary care he might have known. He must also show it was not from a hazard incident to the business.<sup>44</sup>

**Illinois.**

The rule has often been stated in this court to be that the burden of proof is upon the plaintiff to show not only that an appliance is defective and the master had notice thereof or should have had notice, but also that the serv-

40. See *Sweeney v. Jessup & Moore Paper Co.*, 4 Pennw. (Del.) 284, 54 Atl. 954.

41. *Southern Turpentine Co. v. Douglass*, — Fla. —, 54 So. 385.

42. *Central of Ga. R. Co. v. Ruff*, 127 Ga. 200; *Charleston &*

*W. C. R. Co. v. Midler*, 113 Ga. 15, 38 S. E. 338; *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133.

43. See *infra* —.

44. *Minty v. Union Pac. R. Co.*, 2 Idaho, 437, 21 Pac. 660, 4 L. R. A. 409.



ant did not know of the defect and had not equal means of knowing with the master.<sup>45</sup>

Yet the court has stated "that the allegations of due care in the plaintiff's declaration negatived his knowledge of the defects by which he was injured, and the declaration stands as if containing an express allegation that plaintiff had no such knowledge. If plaintiff had knowledge of the defects through which his injury was received, the fact of such knowledge is matter of defense."<sup>46</sup>

It is difficult to understand how any allegation on the part of the plaintiff as to his knowledge or want of knowledge is material if such matter is purely defensive, but it seems, however, such ruling was made in two prior cases at least.<sup>47</sup>

#### Indiana.

In Indiana the burden is upon the plaintiff to show that he did not assume the risk of danger, and absence of knowledge of the defect of which he complains.<sup>48</sup>

45. *Ross v. Chicago, R. I. & P. R. Co.*, 243 Ill. 440; *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Montgomery Coal Co. v. Barringer*, 218 Ill. 329, 75 N. E. 900; *Chicago & E. I. R. Co. v. Heery*, 203 Ill. 492, 68 N. E. 74; *Elgin G. & E. R. Co. v. Meyers*, 226 Ill. 358, 80 N. E. 897; *George B. Swift Co. v. Gaylord*, 229 Ill. 330, 82 N. E. 299.

46. *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72.

47. *Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 242; *Railroad Co. v. Simmons*, 38 Ill. 242.

48. *Chicago & East R. Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630, 45 N. E. 817; *Cleveland, C. C. & St. L. R. Co. v. Parker*, 154 Ind. 153, 56

N. E. 86. It is incumbent upon the plaintiff to negative in his complaint knowledge on his part of the unskillfulness or incompetency of fellow-servants, where the gravamen of his complaint is the employment or retention of such by the master. He must also negative knowledge on his part of the want of safety or defective condition of appliances which he alleges are the cause of his injuries. *Indiana B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355.

**Iowa.**

The burden is upon the defendant to prove that the plaintiff had knowledge of the danger to which he was exposed. It is an affirmative defense. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery, which he aided to operate, it is then incumbent upon the plaintiff to show that he was in some manner justifiable in exposing himself to the danger.<sup>49</sup>

If a company wishes to avail itself of the fact that an employee waived its negligence by remaining in its employ with knowledge of the defects, and without objection and without promise of their being remedied, it must plead such facts as a defense, and establish them affirmatively by evidence, and it is not incumbent upon the plaintiff to negative them in the first instance.<sup>50</sup>

An admission in a reply that the injured employee continued at work with knowledge of the defective appliance or place of work, standing alone, admits a waiver of that defect, and hence the defendant is not required to prove the waiver.<sup>51</sup>

**Kentucky.**

The averment of want of knowledge of the dangerous condition of premises or appliances upon the part of an injured servant is necessary to the statement of a cause of action. The question of knowledge is distinct from that of contributory negligence. The reasoning of the court is that this results from the rule that the master is not an insurer of the safety of the servant, nor a guarantor that the appliances are absolutely safe, and that such conditions as are known to the servant he assumes the risk of.<sup>52</sup>

49. *Coates, Admx. v. Burlington, C. R. & N. R. Co.*, 62 Iowa, 486. See also *Calloway v. Agar Packing Co.*, 129 Ia. 1; *Arenschield v. Chicago, R. I. & P. R. Co.*, 128 Ia. 677; *Shebeck v. National Cracker Co.*, 120 Ia. 414.

50. *Mayes, Admr. v. C. R. I. &*

*P. R. Co.*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680.

51. *Ford v. Chicago, R. I. & Pac. R. Co.*, 106 Ia. 85, 71 N. W. 332.

52. *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Willie v. East T. C. Co.*, 27 Ky. L. Rep. 335,

But in actions under the Kentucky statute and constitution to recover damages for death by the negligent or wrongful act of defendant, the burden of proof is upon the defendant to show assumption of risk. The rule is not applicable where death does not result.<sup>53</sup>

#### Louisiana.

The burden of proof is upon the defendant to prove that the employee knew of the danger, and notwithstanding exposed himself willingly and deliberately to it.<sup>54</sup>

#### Maine.

It is held that the complaint must allege that the defect was unknown to plaintiff,<sup>55</sup> and hence the burden of proof is on plaintiff.

#### Michigan.

Knowledge on the part of an employee of the existence of defects in appliances was held to be matter of defense.<sup>56</sup>

The burden of proof is upon the master, where a servant is injured in consequence of a risk not ordinarily incident to the employment, growing out of the master's negligence, to show the servant knew and understood the increased danger.<sup>57</sup>

#### Minnesota.

The burden is upon the defendant to show assumption of risk. It need not be negatived in the complaint.<sup>58</sup>

84 S. W. 1166. But see *Chesapeake & N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35.

53. *Lexington & Carter Min. Co. v. Stephen's Admr.*, 20 Ky. L. Rep. 696, 47 S. W. 321.

54. *Myhan v. Louisiana E. L. & P. R. Co.*, 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172; *Parrenin v. Crescent City S. & S. Co.*, 120 La. 75, 44 So. 990.

55. *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212.

56. *Swobodo v. Ward*, 40 Mich. 420.

57. *McDonald v. Champion Iron & Steel Co.*, 140 Mich. 401, 103 N. W. 829. If injured by extraordinary or unusual risk due to the master's negligence, the master has the burden of showing that the servant knew of the unusual danger. *Cristianelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910.

58. *Thompson v. Great Northern R. Co.*, 70 Minn. 202, 72 N. W. 962.

**Missouri.**

Assumption of risk and contributory negligence are affirmative defenses the burden of pleading and establishing of which rests upon the defendant.<sup>59</sup>

The rule in this state is substantially the same as in Iowa. The burden is upon the defendant to plead and prove knowledge on the part of the plaintiff of defects in appliances causing him injury.<sup>60</sup>

**Montana.**

The burden is on defendant.<sup>61</sup>

**Nebraska.**

If the assumption of a risk not usually and ordinarily incident to the service, is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded by defendant.<sup>62</sup>

And the burden of proof is upon the master.<sup>63</sup>

But if the risk claimed to have been assumed is an ordinary as distinguished from an extraordinary risk, the assumption must be negatived in the complaint.<sup>64</sup>

**New Jersey.**

The defense need not be negatived in the complaint. The burden of proof is on defendant.<sup>65</sup>

**New York.**

The burden of proof is upon the defendant to show that the plaintiff assumed the risk.<sup>66</sup>

59. *Fisher v. Central Lead Co.*, 156 Mo. 479, 56 S. W. 1107; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827.

60. *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3; *Young v. Shickle H. & H. Iron Co.*, 103 Mo. 324, 15 S. W. 771.

61. *Nord v. Boston & M. C. C. & S. M. Co.*, 33 Mont. 464.

62. *Maxson v. J. I. Case Mach. Co.*, 81 Neb. 546, 116 N. W. 281, 16 L. R. A. 963; *Evans Laundry*

*Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177.

63. *Grimm v. Omaha Elec. L. & P. Co.*, 79 Neb. 395, 114 N. W. 769.

64. *Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 802.

65. *Towler v. New Jersey Adamant Mfg. Co.*, 79 N. J. L. 140, 74 Atl. 279. But see *Grover v. New York, S. & W. R. Co.*, 76 N. J. L. 237, 69 Atl. 1082.

66. *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266; *Hunt v. Dex-*

**North Carolina.**

Whenever a servant, whose conduct has been blameless, sustains an injury by reason of an implement put into his hands by the master or his agents to be used in the prosecution of his work, a responsibility must attach to the master. It is true he may free himself of this responsibility by showing that he has at all times been diligent and circumspect as well in the choice of his associates as in the selection and preservation of the implements to be used by him.<sup>67</sup>

It was held that where the allegation is that a party has been negligent and careless in respect to a matter wherein he is bound to use care and diligence, the necessary and legal implication is that he knew, or by reasonable diligence might have known, of the material defects and imperfections that gave rise to the injury complained of.<sup>68</sup>

It has recently been held, however, that assumption of risk is a matter of defense.<sup>69</sup>

**Ohio.**

In an action by a servant against the master for injury resulting from the negligence of the latter in furnishing appliances or in caring for the premises where the work is done, the plaintiff must aver want of knowledge on his part of the defects causing the injury, or that, having such knowledge, he informed the master and continued in his employment upon a promise, express or implied, to remedy the defects; an averment that the injury occurred without fault on his part is not sufficient.<sup>70</sup>

The act of 1890 (87 Ohio Laws, p. 149) has the effect to charge the master with knowledge of the defect causing injury, and prima facie evidence of negligence. The force

ter Sulphite Pulp & Paper Co., 183 N. Y. 544, 76 N. E. 1097; Dowd v. N. Y. O. & W. R. Co., 170 N. Y. 459, 63 N. E. 541.

67. Cowles v. Richmond & D. R. Co., 84 N. C. 309, 37 Am. Rep. 620.

68. Warner v. Western N. C. R. Co., 94 N. C. 250.

69. Lloyd v. Haues, 126 N. Car. 539, 35 S. E. 611; Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

70. Coal & Car Co. v. Norman, 49 Ohio St. 598.

of this statute is wholly expended in relieving the servant of the duty of establishing that the master had or should have had notice of the defect. His duty to establish that the appliance was defective and that he did not know of the defect, remains unchanged.<sup>71</sup>

#### **Oregon.**

While the burden of proof is on the plaintiff to show that the appliance was defective, and that the master had notice thereof, or knowledge, or ought to have had, the burden of proof is on the defendant to show that the servant did know of the defect, and that his negligence contributed to the injury.<sup>72</sup>

#### **Rhode Island.**

Facts negating assumption of risk by plaintiff must be alleged in the declaration.<sup>73</sup>

#### **South Carolina.**

Knowledge on the part of a servant of the defects which caused him injury is a matter of defense. It constitutes no part of the plaintiff's cause of action. The court classes knowledge as contributory negligence as they say, "But this is upon the ground that he has by his own negligence contributed to the injury of which he complains, and it is well settled, in this state at least, that contributory negligence is an affirmative defense."<sup>74</sup>

#### **Texas.**

The burden is on defendant to allege and prove that plaintiff assumed the risk.<sup>75</sup>

71. *Hesse v. Columbus S. & H. R. Co.*, 58 Ohio St. 167, 50 N. E. 354.

72. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 94, 31 Pac. 283; *Tucker v. Northern Pac. T. Co.*, 41 Oreg. 82, 68 Pac. 426.

73. *Dalton v. Rhode Island Co.*, 25 R. I. 474, 57 Atl. 383 (explaining *Lee v. Reliance Mills Co.*, 21 R. I. 322, 43 Atl. 536.)

74. *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Donahue v. Railroad Co.*, 32 S. C. 299; *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987.

75. *Missouri, K. & T. R. Co., of Texas v. Jones*, 35 Tex. Civ. App. 584, 80 S. W. 852; *Price v. Consumers' Cotton Oil Co.*, 41 Tex. Civ. App. 47, 90 S. W. 717.

**Utah.**

The burden is on defendant.<sup>76</sup>

**United States courts.**

The defense need not be negatived in the complaint.<sup>77</sup>

Evidence that plaintiff knew of the defect which caused the injury and assumed the risk is inadmissible when defendant fails to plead such facts.<sup>78</sup>

**Vermont.**

If it be assumed that a risk is extraordinary, the burden is upon the plaintiff to show that he did not assume it, by proving that he did not know and comprehend it and that it was not plainly observable so that the law charged him with comprehending it.<sup>79</sup>

**Virginia.**

The servant must use ordinary care to avoid injuries to himself, it was said and to entitle him to recover for the defects in the appliances he is ordinarily required to show (1) that the appliance in question was defective; (2) that the employer knew or ought to have known of the defect; and (3) that the employee did not know of it. The general rule undoubtedly is, that the plaintiff need not aver and prove that he was not guilty of contributory negligence. But he must prove, and therefore must aver, that the injury complained of did not result from the ordinary hazards of the business which he is presumed to have voluntarily assumed, nor from his own fault, but from a cause which brings the case within the exception to the general rule which exempts the employer from

76. *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799.

77. *Pennsylvania R. Co. v. Forstall*, 159 Fed. 893.

78. *Oregon Short Line & U. N. R. Co. v. Tracy*, 66 Fed. 931. A servant is not presumed to know of defects in a fuse being used by him to explode a blast where not

obvious. His knowledge or facts charging him with knowledge, are matter of defense. *Conroy v. Oregon Construction Co.*, 23 Fed. 71.

79. *Hatch v. Reynolds Estate*, 80 Vt. 294, 67 Atl. 816; *Fowle's Admx. v. McDonald, Cutter & Co.*, 82 Vt. 230, 72 Atl. 989.

liability to the employee for injuries received by the latter in the course of his employment.<sup>80</sup>

In a later case, it is held that it is unnecessary in the declaration on the part of the employee to allege his ignorance of the danger to which he was exposed.<sup>81</sup>

When the servant shows that his injuries were in consequence of an increased risk not incident to his ordinary employment, but growing out of the master's negligence, the burden of proof is on the master to show that the servant understood the increased dangers.<sup>82</sup>

#### Washington.

Assumption of risk is an affirmative defense and must be pleaded.<sup>83</sup>

#### West Virginia.

In West Virginia, it is not necessary to negative assumption of risk in the complaint,<sup>84</sup> but the decisions are not entirely clear as to burden of proof.<sup>85</sup>

80. *Norfolk & W. R. Co. v. Jackson's Admr.*, 85 Va. 489, 8 S. E. 370.

81. It was stated the master is exempt from liability where the danger is known to the servant, which is but another form of stating that the plaintiff cannot recover for injuries to which his own negligence has contributed. This is true, but contributory negligence is matter of defense and need not be negatived by the plaintiff in his declaration. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

82. *Norfolk & W. R. Co. v. Ward*, 90 Va. 678, 19 S. E. 849, 44 Am. St. Rep. 945, 24 L. R. A. 717.

83. *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

84. *Hoffman v. Dickinson*, 31 W. Va. 142.

85. A servant who seeks to recover for an injury which he claims resulted from defective machinery or appliances takes upon himself the burden of establishing negligence on the part of the master, and due care on his part, and to entitle him to recover he must overcome two presumptions; (1) That the master has discharged his duty to him by providing suitable machinery and appliances for the business and keeping them in condition, and (2) that he assumed all the usual and ordinary hazards of the business. Such servant takes upon himself the burden of showing that the master had notice of the defects complained of, or in the exercise of that ordinary care which he is bound to observe, he would have known of, and that the servant was ignorant of, such defect, and had not equal means of



**Wisconsin.**

Knowledge on the part of an employee of the existence of defects in appliances was held to be matter of defense.<sup>86</sup>

In an action by an employee against a railroad company for personal injuries, where the plaintiff's right of action depends upon his ignorance of certain conditions, as defects in a switch engine and unskilfulness of the engineer, the complaint need not aver such ignorance, but it is for the defendant to aver and prove knowledge on the part of the plaintiff.<sup>87</sup>

**§ 769. Contributory negligence.**

While in some states the burden of proving the absence of contributory negligence is on plaintiff, yet in most jurisdictions the burden of proving contributory negligence is on defendant.

But even in some of those states where contributory negligence is ordinarily a defense which must be alleged and proved by defendant, yet if a statute gives a new cause of action provided the plaintiff has not been guilty of contributory negligence, it has been held that the bur-

knowledge. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. 432. See also *Berns v. Gas Coal Co.*, 27 W. Va. 288, 55 Am. Rep. 304; *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 135, 10 S. E. 39.

86. *Hulehan v. G. B. W. & St. P. R. Co.*, 68 Wis. 520, 32 N. W. 592.

87. *Cole v. Chicago & N. W. R. Co.*, 67 Wis. 272, 30 N. W. 600. The employee is only presumed to assume the dangers usually attendant upon his employment; and when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it is shown that he knew of such

unusual and unreasonable danger, and fully comprehended its nature at the time of his employment or before the accident happened. In such case there is no presumption that he assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment by the employee is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery. *Nadau v. White River L. Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

den of negating contributory negligence is on plaintiff,<sup>88</sup> although there is authority to the contrary.<sup>89</sup>

It must be remembered, however, that whether the burden is on plaintiff or defendant, it is universally held that if the evidence on behalf of plaintiff itself shows that he was guilty of contributory negligence, a non-suit must be granted on motion of defendant.

#### Alabama.

Contributory negligence is defensive matter, which must be pleaded and proved by the defendant. The complaint in personal injury cases need not negative the fact that the plaintiff knew, or by reasonable diligence might have known, the defect or negligence charged.<sup>90</sup>

#### Arizona.

In an action for wrongful death the burden of proving contributory negligence is on defendant.<sup>91</sup>

#### Arkansas.

Contributory negligence is a defense to be affirmatively proved. It will be presumed that the injured party was in the exercise of due care until the contrary is made to appear.<sup>92</sup>

88. *Barksdale v. Laurens*, 58 S. C. 413. See also *Shea v. Boston & M. R. Co.*, 154 Mass. 31, 27 N. E. 672.

89. *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. 125; *Dugan v. Chicago, St. Paul, M. & O. R. Co.*, 85 Wis. 609; *Soard v. Western Anthracite Coal & M. Co.*, 92 Ark. 502. In the Wisconsin case, the fellow-servant statute authorized a recovery against a railroad company where the negligence was that of certain specified employees, where the injury was "without contributory negligence" on the part of the injured servant. The court say: "The mere fact that the legislature embodied in the

act in question the words 'without contributory negligence on his part,' when the court would necessarily have supplied the same by construction had they not been so embodied, cannot operate to change the burden of proof from the defendant to the plaintiff."

90. *Mobile & Ohio R. Co. v. George*, 94 Ala. 199, 10 So. 145.

91. *Southern Pac. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710.

92. *Soard v. Western Anthracite Coal & M. Co.*, 92 Ark. 502; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 46, 3 S. W. 808; *Wallis v. St. Louis, I. M. & S. R. Co.*, 77 Ark. 556, 95 S. W. 446.

**California.**

In California it is not necessary for the plaintiff to aver or prove that he himself was without fault.<sup>93</sup>

**Colorado.**

The general rule at common law is that contributory negligence is a defense in actions where the defendant is charged with negligence; and when clearly established by evidence substantially uncontradicted is to be adjudged a defense, as matter of law, by the court.<sup>94</sup>

**Connecticut.**

It is incumbent upon a plaintiff who seeks redress for injuries occasioned by the alleged negligence of the defendant to prove that he was in the exercise of due care at the time, and this by a fair preponderance of the evidence.<sup>95</sup>

93. *Magee v. N. P. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *McQuiken v. C. P. R. Co.*, 50 Cal. 7; *Smith v. Occidental & O. S. Co.*, 99 Cal. 462; *McQuiken v. C. P. R. Co.*, 50 Cal. 7; *Smith v. Occidental & O. S. Co.*, 99 Cal. 462.

94. *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435. If the evidence in the most favorable light in which it may be reasonably considered in behalf of the plaintiff shows the plaintiff was guilty of negligence which contributed to the cause of injury as alleged, and without which the injury would not have happened, then the court may properly nonsuit the plaintiff or direct a verdict for the defendant; but if the evidence be contradictory in any substantial matter on the question of contributory negligence, then such question should be submitted to the jury under proper instructions. Where there

is no conflict in the testimony bearing upon the subject, either of negligence or contributory negligence, the court may, in a clear case, treat the question as one of law, and grant a nonsuit or direct a verdict; but when the determination of the question depends upon the inference to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent and upright men, then the question shall be submitted to the jury under appropriate instructions, even though there may be no conflict in the testimony. It was held that a person was guilty of contributory negligence as a matter of law, who attempted to pass between cars upon a track through an opening between them two feet wide. *Lord v. Pueblo Smelting & Refining Co.*, 12 Colo. 390, 21 Pac. 148.

95. *Ryan v. Town of Bristol*, 63 Conn. 26, 27 Atl. 309.

It was subsequently held, however, in an action by a servant for personal injuries, that where there is a hearing in damages, the burden is on the defendant to prove that the injury was not caused by his negligence and that the plaintiff was guilty of contributory negligence.<sup>96</sup>

**Delaware.**

In order to hold an employer responsible for the acts or omissions of his agents, where the rights of others are concerned, such acts or omissions must be proved by defendant, and also it must appear that the plaintiff was not guilty of any contributory negligence.<sup>97</sup>

**Florida.**

The burden is on defendant.<sup>98</sup>

**Georgia.**

In an action for damages against another than a railroad company for injuries occasioned by negligence, the plaintiff need only prove his injury and the negligence of the defendant by which it was caused in order to make out a prima facie case. Whether or not by the exercise of proper diligence he could have prevented the injury is a matter of defense.<sup>99</sup>

It was subsequently held that the burden of proving due care was on the plaintiff.<sup>100</sup>

Where the employer is a railroad company, the question of contributory negligence as a defense is regulated by a statute which, prior to the amendment of 1909, required plaintiff to prove either (1) that defendant was negligent or (2) plaintiff was free from fault.<sup>101</sup>

96. *Julian v. Stony Creek Red Granite Co.*, 71 Conn. 632, 42 Atl. 994. See also *Simeoli v. Derby Rubber Co.*, 81 Conn. 423, 71 Atl. 546.

97. *Valente v. American Bridge Co.*, 6 Pennw. (Del.) 556, 73 Atl. 395; *Stewart v. Philadelphia W. & B. R. Co.*, 8 Houst. (Del.) 450, 17 Atl. 639; *Huber v. Jackson & Sharp Co.*, 1 Marv. (Del.) 374, 41 Atl. 92.

98. *German American Lumber Co. v. Brook*, 55 Fla. 577, 46 So. 740; *Taylor v. Prairie Pebble Phosphate Co.*, 54 So. (Fla.) 904.

99. *City of Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 678.

100. *McDaniels v. Acme Brewing Co.*, 113 Ga. 80, 38 S. E. 404.

101. *Atlantic Coast Line R. Co. v. Jones*, 132 Ga. 189. See also *supra*, ———.

The rule under the 1909 amendment is stated in a subsequent section.<sup>102</sup>

### Idaho.

Contributory negligence of the plaintiff, if relied upon by the defendant, is a defense to be established by the defendant.<sup>103</sup>

### Illinois.

The burden is on the plaintiff not only to show negligence of the defendant, but also the exercise of due care on his own part.<sup>104</sup>

The law does not always require positive proof of due care and diligence on the part of the plaintiff. Under certain circumstances it may be taken for granted that he observed usual and ordinary care for his personal safety. Thus, where an engineer upon a railroad, who was killed by defects in a foot board, was shown to be a careful and

Proof that a deceased employee of a railroad company who was killed by the running of its train, was without fault, raises a presumption that the company was in fault. Proof that the servants of the company operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. *Augusta Southern R. Co. v. McDode*, 105 Ga. 134, 31 S. E. 420. So much of sec. 2321, Civil Code of Georgia, as is embraced in the phrase "the presumption in all cases being against the company," is inapplicable to a case where a railroad company is sued for the killing of an employee unless the plaintiff affirmatively shows that the deceased was free from fault. *Augusta Southern R. Co. v. McDode*, 105 Ga. 134, 31 S. E. 420. The burden of proof is upon the plaintiff to show that he was not

to blame or that the company was. The burden of showing that the agents of the company have exercised all ordinary and reasonable care and diligence is not imposed upon the company until the plaintiff has shown that the employee was free from fault or that the company was at fault. *Western & A. R. Co. v. Jackson*, 113 Ga. 355, 38 S. E. 820; *Campbell v. Atlantic, etc., R. Co.*, 53 Ga. 488, 56 Ga. 586; *Georgia R. & B. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613.

102. See *supra*, § —.

103. *Hopkins v. Utah Northern R. Co.*, 2 Idaho, 277, 13 Pac. 343; *Goure v. Storey*, 17 Idaho, 352, 105 Pac. 794.

104. *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Illinois C. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; *Kepperly v. Ramsden*, 83 Ill. 354; *Abend v. T. H. & I. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616.

competent servant in his employment, and he was seen a few moments before his death in the observance of due care, it was held that it could not properly be said there was an entire want of evidence on this branch of the case.<sup>105</sup>

Where the negligence of the defendant is gross, it has been held that the exercise of due care on the part of the plaintiff may be regarded as proved, where it is shown that the negligence of the plaintiff was, in comparison, slight, but the burden, even in that case, is on the plaintiff to show that he was free from such negligence as would defeat the action.<sup>106</sup>

### Indiana.

Independent of statute, the burden of proof of negligence of defendants, and absence of contributory negligence of plaintiff, is on the latter, but it will be sufficient if these facts appear either directly or circumstantially. It is only where the facts and circumstances surrounding the injury point neither one way nor the other that the plaintiff must fail for want of affirmative proof.<sup>107</sup>

105. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Chicago, B. & Q. R. Co. v. Clark*, 92 Ill. 43.

106. *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63; *Chicago, B. & Q. R. Co. v. Harwood*, Admx., 90 Ill. 425. Rule of comparative negligence, however, no longer prevails.

107. *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. An averment in a complaint that plaintiff was himself without fault is sufficient to exclude the existence of contributory negligence. The plaintiff, however, must aver facts showing that the danger which augmented the risks of his service

was not known to him. *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, 19 N. E. 770; *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Ft. Wayne, C. & L. R. Co. v. Gruff*, 132 Ind. 13, 31 N. E. 460. Absence of contributory negligence did not appear where a workman was injured by falling into a moulding pit, there being no evidence as to what he was doing at the time, and his regular place of work was fifty feet away, and just before he was injured he was working fourteen feet away. *East Chicago Foundry Co. v. Ankeny*, 19 Ind. App. 150, 49 N. E. 186.

Under the 1899 statute, however contributory negligence is matter of defense, the burden of proving it being upon the defendant.<sup>108</sup>

**Iowa.**

In Iowa, the plaintiff alleging negligence must prove that he was not guilty of negligence contributing to the injury. This does not require direct and positive proof, but the fact may sometimes be fairly and reasonably inferred from circumstances.<sup>109</sup>

Where such evidence cannot be obtained, it is proper for the jury to consider the instinct of men which naturally leads them to avoid danger, as evidence of due care on the part of the person injured.<sup>110</sup>

Contributory negligence is not a defense; its absence is a matter to be pleaded and proved to justify a recovery. It is proper for the jury to consider the natural instinct of self preservation, since direct and positive evidence is not required to show an absence of negligence. If it may be inferred from all the evidence in the case, it is sufficient. But it will not do to say that one can go upon a railroad track without having a duty there, and if, while walking, he is struck by a train, the jury may assume from the instinct of self preservation alone that he was diligent. In reference to the facts it was said: "If he exercised the sense of hearing, he must have heard the train in time to get off the track. If he did not hear it, it was because he was not attentive. And in either case it was negligence. The facts overcome any presumption to arise from the rule as to the instinct of self-preservation."<sup>111</sup>

108. *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060. Need not be negatived in the complaint. *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229.

109. *Murphy v. C. R. I. & P. R. Co.*, 45 Ia. 661; *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N. W. 653.

110. *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N. W. 653.

111. *Baker v. C. R. I. & P. R. Co.*, 95 Iowa 163, 63 N. W. 667. The rule being in the particular state that the plaintiff must show freedom from negligence, such rule does not require that it be established direct affirmative proof of par-



**Kansas.**

In an action against a railroad company to recover damages for personal injury to an employee, occasioned by the negligence of a co-employee, it is unnecessary for the plaintiff to aver that there was no fault or negligence on the part of the injured person. Contributory negligence is a matter of defense.<sup>112</sup>

**Kentucky.**

Though contributory negligence is a defense which confesses and avoids plaintiff's case, and must be affirmatively pleaded by defendant, yet where the petition itself states facts showing that plaintiff was guilty of such contributory negligence as to prevent his recovery, the question may properly be raised by demurrer.<sup>113</sup>

**Louisiana.**

To recover damages for personal injuries received from a railroad company, it is necessary for plaintiff to show that the accident in consequence of which the injuries were received, was caused by the negligence of the company, and that the plaintiff was not guilty of any negligence which aided the accident.<sup>114</sup>

**Maine.**

The burden of proof in actions for personal injuries is on the plaintiff to show that the injured party was in the exercise of due care and diligence at the time of the injury

ticular acts of care, but it may be inferred from circumstances that he was in the exercise of the care. *Knowlton v. Des Moines Ed. S. Co.*, 117 Iowa, 451, 90 N. W. 818.

112. *Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 574; *Railroad Co. v. Phillibert*, 25 Kan. 405.

113. *Favre v. Louisville & N. R. Co.*, 91 Ky. 541, 16 S. W. 370; *Railroad Co. v. Hoehl*, 12 Bush. 41; *Railroad Co. v. Thomas*, 79 Ky. 160.

114. *Deikman v. Morgan's L. & T. R. & S. S. Co.*, 40 La. Ann. 787, 5 So. 76. But see *Myhan v. Louisiana E. L. & P. Co.*, 41 La. Ann. 964. The failure to establish the allegations of the complaint in respect to defendant's negligence, does not throw upon the defendant the burden of accounting for the accident. *Duncan v. St. Louis I. M. & S. Ry. Co.*, 51 La. Ann. 775, 26 So. 478.



or at least that the want of such care on his part in noway contributed to produce it. It is not enough to show that the defendant was negligent. It is incumbent on the prosecuting party to go further and directly or indirectly, by affirmative proof, satisfy the jury that no want of due care on the part of the injured party helped to produce the accident.<sup>115</sup>

#### **Maryland.**

In an action against a railroad company for the death of a servant, alleged to have resulted from defendant's negligence, the declaration is defective if it fails to negative the existence of contributory negligence on the part of deceased.<sup>116</sup>

It was held in a former case that the burden of showing contributory negligence on the part of the plaintiff rests upon the defendant as well in suits occasioned by defects in county roads and bridges as in actions against railroad companies for injuries occasioned by them.<sup>117</sup>

#### **Massachusetts.**

Wherever there is negligence on the part of the plaintiff contributing directly as a proximate cause to the occasion from which the injury arises, such negligence will prevent the plaintiff from recovering; and the burden is always on him to establish either that he was in the exercise of due care or that the injury was in no degree attributable to any want of care on his part.<sup>118</sup>

It is not necessary, however, that the plaintiff should prove due care on his part by directly affirmative evi-

115. *State v. Maine Cent. R. Co.*, 77 Me. 538, 1 Atl. 673, s. c. 76 Me. 357; *Benson v. Titcomb*, 72 Me. 31; *Wyman v. Berry*, 106 Me. 43, 75 Atl. 123; *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 387.

116. *State to use of Dodson v. Balt. & L. R. Co.*, 77 Md. 489, 26 Atl. 865.

117. *County Commissioners v. Burgess*, 61 Md. 29. See also *Bernheimer Bros. v. Bager*, 108 Md. 551.

118. *Murphy v. Deane*, 101 Mass. 455; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *French v. Sabin*, 202 Mass. 240.

dence; that inference may be drawn from absence of all appearances of fault on his part.<sup>119</sup>

The plaintiff having the burden to show the employee was in the exercise of due care, must affirmatively prove it by facts or circumstances existing at the time. Where it does not appear how the accident happened, and what the deceased was doing at the time, due care is not shown. That he generally was a competent and careful man, or that he exercised due care on prior occasions, is not sufficient.<sup>120</sup>

The statute of Massachusetts of 1887, known as the Employer's Liability Act, and exempting from the right to recover for personal injuries employees who, knowing the danger of their employment, fail to give information thereof, does not require an employee to prove his ignorance of any danger, or the giving of information, before he can recover, but the burden of such matter is upon the defendant.<sup>121</sup>

#### Michigan.

The gravamen of an action for damages for negligent injury is that the plaintiff has been damnified by the wrongful and negligent conduct of defendant without having contributed thereto by his own negligence, and as the absence of contributory negligence is a part of his own case, he should show that he acted with due care. But it is enough if he merely puts in evidence the facts and circumstances attending the injury, and if these show negligent conduct in the defendant, from which the injury followed as a direct and proximate consequence, and do not show contributory negligence, a *prima facie* case is established.<sup>122</sup>

119. *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37; *Lucas v. N. B. & T. R. Co.*, 72 Mass. 64; *Caron v. Boston & Albany R. Co.*, 164 Mass. 523, 42 N. E. 112.

120. *French v. Sabin*, 202 Mass. 246, 88 N. E. 845.

121. *Connolly v. City of Waltham*, 156 Mass. 368, 31 N. E. 302.

122. *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82.

**Minnesota.**

The burden is upon the defendant to prove contributory negligence on the part of the plaintiff.<sup>123</sup>

The statute of 1887 subjecting railroad companies to liability to their servants for the negligence of fellow-servants does not change the rule as to the burden of proof of contributory negligence.<sup>124</sup>

It need not be negatived in the complaint.<sup>125</sup>

The rule in Minnesota is that in an action by an administrator for injuries resulting in death, the plaintiff's intestate is entitled, in the consideration of the conduct of the deceased at the time of the accident, to every fair and reasonable justification in its favor, that is possible under the circumstances.<sup>126</sup>

**Mississippi.**

The burden of proof is on defendant to show contributory negligence except in those cases where the declaration alleges facts which prima facie show contributory negligence, but coupled with matter in avoidance, and except where plaintiff's evidence discloses contributory negligence.<sup>127</sup>

**Missouri.**

Contributory negligence is a defense, the burden of proving which is on the defendant.<sup>128</sup>

123. *Greene v. Minneapolis & St. Louis R. Co.*, 31 Minn. 248, 17 N. W. 378, 27 Am. Rep. 785.

124. *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. 125.

125. *Thompson v. Great Northern R. Co.*, 70 Minn. 202, 72 N. W. 962.

126. *Hooper v. Great Northern R. Co.*, 80 Minn. 400, 83 N. W. 440.

127. *Simms v. Forbes*, 86 Miss. 412. Contributory negligence of an employee in an action against the master is matter of defense.

*Buckner v. Richmond & D. R. Co.*, 72 Miss. 873, 18 So. 449.

128. *Edington v. St. Louis & S. F. R. Co.*, 204 Mo. 61; *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258, 24 S. W. 57. It devolves upon the defendant, not the plaintiff, to plead and prove want of care or contributory negligence on the part of the plaintiff. This is the settled rule in this state. In cases where the defendant is injured by defective machinery, it is not incumbent upon the plaintiff to prove want of knowledge of the defect in the appliance. That

**Montana.**

In an action for injuries, contributory negligence is a matter of defense, and the plaintiff is not required to prove its absence as a part of his case. When, however, the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him.<sup>129</sup>

**Nebraska.**

Contributory negligence is a matter of defense, and the burden of its proof is on the defendant. If the plaintiff proves his case without disclosing any contributory negligence, he will be assumed to be free therefrom.<sup>130</sup>

**New Hampshire.**

The rule in this state appears to be that contributory negligence is a matter of defense.<sup>131</sup>

**New Jersey.**

Contributory negligence is a matter of defense, yet if it clearly appear at the close of the plaintiff's evidence, the court should nonsuit.<sup>132</sup>

**New York.**

It is now provided by statute in this state that contributory negligence is a defense which must be proved and pleaded. Formerly, in cases where contributory negligence may be claimed, it was settled that the absence of

is matter of defense. (Citing *Young v. Iron Co.*, 103 Mo. 324, 15 S. W. 771.) The same rule applies where the servant is suing for injuries occasioned by the negligence of an incompetent servant. *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

129. *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Schroeder v. Montana Iron Works*, 38 Mont. 479, 100 Pac. 619.

130. *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 668; *Union Stock*

*Yards Co. v. Conoyer*, 41 Neb. 617, 59 N. W. 950.

131. *Smith v. Eastern R. Co.*, 35 N. H. 356.

132. *Berry v. Pennsylvania Co.*, 19 Vroom 141. If the case presents a fairly debatable question whether the plaintiff's negligent conduct contributed to the injury, the solution of that question is for the jury, but if it clearly appears that such conduct did contribute to the production of the injury, then the court should control the case and direct a nonsuit. *Pennsylvania R. Co. v. Righter*, 13 Vroom 180.

contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury on that point rests upon him. If the evidence leaves it in doubt, the defendant is entitled to the benefit of the doubt.<sup>133</sup>

#### North Carolina.

It is now settled that defendant must allege and prove contributory negligence,<sup>134</sup> although formerly the question was in doubt.<sup>135</sup>

133. *Hale v. Smith*, 78 N. Y. 480; *Hart v. Hudson Riv. Bridge Co.*, 84 N. Y. 56; *Whalen v. Citizens G. L. Co.*, 151 N. Y. 70, 45 N. E. 363. Cases may arise where proof of facts of itself shows there was no contributory negligence; but where there is no evidence as to what actually did take place at the time, and the proof is such as to render it uncertain in regard to that subject, it cannot be said that absence of such negligence is established within the rule referred to. In such a case no inference can legitimately be drawn in favor of the plaintiff within the rule stated in *Powell v. Powell*, 71 N. Y. 77; *Hart v. Hudson Riv. Bridge Co.*, 84 N. Y. 56.

134. *Boney v. Atlantic Coast Line R. Co.*, 71 S. E. (N. C.) 87; *Steward v. R. Co.*, 137 N. C. 690, 50 S. E. 312; *Haltorn v. Southern R. Co.*, 127 N. Car. 255, 37 S. E. 262.

135. In *Doggett v. Railway Co.*, 78 N. C. 305, the statement is made that "the danger was imminent, and the law imposes the burden upon the plaintiff of showing that he was not negligent." In *Owens v. Railway Co.*, 88 N. C., on page 517, one of the justices expressly states up to that time it

had been an open question, and hopes that the court would settle it. He favored the rule which placed the burden on the defendant. The rule of several states is discussed by the chief justice, rendering the opinion of the court, but is not decided any further than what is stated, to-wit: "While we do not undertake to reconcile the divergent decisions in reference to the burden of proof, we think a clear deduction from them, and as well supported by sound reasoning, is that if, in disclosing the facts which constitute the defendant's negligence, it does not appear whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was no such want of it on his part; and if the plaintiff in any legal sense was the cause, or the concurring cause, of his own injury, the duty of showing it in self exculpation devolves upon the plaintiff. The inference of this co-operating agency may be drawn from the plaintiff's proofs of the defendant's neglect or misconduct, as well as by substantial and independent testimony produced by the defendant."

**Ohio.**

It is only where the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast upon the defendant; for where the plaintiff's own case raises the suspicion that his own negligence contributed to the injury, the presumption of due care on his part is so far removed that he cannot properly be relieved from disproving his own contributory negligence by casting the burden of proving it upon the defendant, the same as if the presumption in favor of the plaintiff was unquestioned in his own case. The question should be left, upon the whole evidence, to the determination of the jury, with the instruction that the plaintiff cannot recover if his own negligence contributed to the injury.<sup>136</sup>

**Oregon.**

Contributory negligence is a defense and must be averred as such, and where the injury results from the direct act or omission of the defendant, which *prima facie* is negligence itself, and the plaintiff receives an injury in consequence thereof while pursuing the ordinary course of his affairs, he will not be compelled, in order to recover his damages, to prove that he was free from fault. The burden is on the defendant, in case of personal injury caused by defective appliances, to show that the servant did not know of the defect and that his negligence contributed to the injury.<sup>137</sup>

**Pennsylvania.**

In actions to recover damages received on account of the negligence of the defendant, it has sometimes been said that the plaintiff must present a case clear from contributory negligence. The obvious meaning of that and similar forms of expression, is, that the burden is on the plaintiff to prove that the injury complained of was

136. Robinson v. Weaver, 28 Ohio St. 241. & U. N. R. Co., 23 Oreg. 94, 31 Pac. 283; Doyle v. Southern Pac.

137. Johnston v. Oregon, S. L. Co., 108 Pac. (Oreg.) 201.

caused by defendant's negligence, and if in so doing the fact is disclosed that his own negligence contributed to the result, there can be no recovery because the case as thus presented by the plaintiff is not clear of contributory negligence. It was never intended to mean that the plaintiff, after first proving affirmatively that the defendant's negligence caused the injury, must also prove negatively that he himself was not guilty of any negligence that contributed to the result.<sup>138</sup>

#### **Rhode Island.**

The burden of disproving contributory negligence is on plaintiff.<sup>139</sup>

#### **South Carolina.**

Ever since the case of *Carter v. Railroad Co.*, 19 S. C. 20, if not before, it has been settled in this state, that a nonsuit cannot be granted upon the ground that the evidence shows contributory negligence on the part of the plaintiff, for the very obvious reason, as stated in that case, that it involves the decision of a question of fact, of which, under the constitution, the jury alone has cognizance in a law case. Contributory negligence is a matter of defense, and presents a question of fact to be solved by the jury.<sup>140</sup>

#### **Tennessee.**

The court declined to decide the question as to where lies the burden of proof in cases where contributory negligence is involved, as an abstract proposition.<sup>141</sup>

138. *Bradwell v. Pittsburg & W. E. P. R. Co.*, 139 Pa. St. 404, 20 Atl. 1046; *Baker v. Westmoreland, etc., Gas Co.*, 157 Pa. St. 593, 27 Atl. 789.

139. *Judge v. Narragansett Electric Lighting Co.*, 21 R. I. 128, 42 Atl. 507 [explaining *Cassidy v. Angell*, 12 R. I. 447.]

140. *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745.

141. It was held, however, where a child, after being placed by its father in the care of a relative, was killed while on defendant's tracks, that the burden was upon the father, suing as administrator, to show that neither himself nor the child's custodian was guilty of contributory negligence. *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 31 S. W. 163.

**Texas.**

It is incumbent upon the plaintiff, suing for injuries received by an employee, to show how and under what circumstances the accident occurred; how he was employed at the time, and what the facts were constituting the negligence of the defendant; and if his own conduct was connected with the negligence of the defendant so as to bring about the injury, to show what connection, and in so doing to acquit himself of carelessness or establish the fact that he was exercising due care; for if, in the necessary statement of his own case and his connection with it, it appears that he was negligent or that he failed to exercise proper caution, he cannot recover. He cannot recover unless he shows how the injuries were received. After proof of his case establishing the negligence of the defendant, and his own acts immediately connected therewith as free from fault, there may be yet such negligence on his part, independent of his *prima facie* case, as will discharge the defendant of liability, and which, to become available as a defense, must be alleged and proved by the defendant. It is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributory negligence on the part of the plaintiff. An exception to this rule exists where the petition from its averments would establish, if unexplained, a *prima facie* case of negligence of the party injured. If the defendant relies upon contributory negligence not developed by plaintiff's case, he must allege it. It is a defense in the nature of avoidance.<sup>142</sup>

The burden of proving contributory negligence in a suit by an employee is on the defendant.<sup>143</sup>

142. *Murray v. Gulf C. & S. F. R. Co.*, 73 Tex. 2, 11 S. W. 125.

143. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513; *Missouri, K. & T. R. Co. v. Hogan*,

88 Tex. 679, 32 S. W. 1035; *Houston & T. C. R. Co. v. Davenport*, 102 Tex. 369; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204.



**United States courts.**

The burden of proving contributory negligence rests upon the defendant, and it will not avail the defendant unless it has been established by a preponderance of evidence. This does not imply that the defendant can have no benefit of it if it is established by plaintiff's evidence, nor that the fact can only be made effectual by a preponderance of evidence coming exclusively from the party upon whom rested the burden of proof.<sup>144</sup>

**Vermont.**

It is not necessary, especially in cases of injury from defective highways, that the plaintiff shall establish affirmatively in the outset that he was not guilty of negligence or a want of care in his own conduct or management, in order to show an apparent right of recovery. Where the defect is conceded or proved, the plaintiff is bound to give sufficient evidence to establish *prima facie* that he sustained an injury by reason of such defect. If the plaintiff's own evidence shows that his conduct on the occasion was careless or negligent, and that such carelessness or negligence aided or contributed to the injury he received, he establishes a defense to his action by his own evidence, as much as if the same fact were proved by the defendant. But if the plaintiff's proof discloses nothing but that his conduct at the time was proper and prudent, he is not bound to go further until this has been impugned by some evidence of the other side. The plaintiff in such case is bound to make out affirmatively that his damage was caused by the defect in the highway in order to recover. Evidence which proves affirmatively that the injury was caused by the defect in the highway must necessarily show, to a certain extent, negatively that it was not caused by anything else. To this extent, and this only, can it be said that the burden of proof is on the plaintiff in such case

144. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Hough v. Railway Co.*, 100 U. S. 213; *Baltimore & O. R. Co. v. Burris*, 111 Fed. 882.

to show in the outset of his case that his own negligence did not cause or contribute to his injury.<sup>145</sup>

#### Virginia.

The burden is upon the defendant to prove contributory negligence on the part of the plaintiff. The law presumed a party to have been in the exercise of ordinary care.<sup>146</sup>

#### Washington.

In actions by an employee against the employer for personal injuries, the burden of proof as to contributory negligence of such employee rests upon the defendant.<sup>147</sup>

#### West Virginia.

Notwithstanding there are some statements in the decisions tending to support the contrary rule,<sup>148</sup> it is believed that the rule still is that the burden of proving contributory negligence is on defendant and that it need not be negatived in the complaint.<sup>149</sup>

#### Wisconsin.

Contributory negligence of the plaintiff is an affirmative defense which must be proved by defendant.<sup>150</sup>

145. *Hill, Admr. v. Town of New Haven*, 37 Vt. 501.

146. *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *Baltimore & Ohio R. Co. v. McKenzie*, 81 Va. 71; *Sheeler's Admr. v. C. & O. R. Co.*, 81 Va. 188, 59 Am. Rep. 654.

147. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32.

148. A servant who seeks to recover for an injury which he claims resulted from defective machinery or appliances furnished by the master, to be used about the business in which such servant was employed, takes upon himself the burden of establishing negligence on the part of the master and due care

on his own part, and in order to entitle him to recover he must overcome two presumptions: First, that the master has discharged his duty to him by providing suitable machinery and appliances for the business, and keeping them in that condition; second, that he assumed all the usual and ordinary hazards of the business. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. 432.

149. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260, 12 S. E. 512.

150. *McQuade v. C. & N. W. R. Co.*, 68 Wis. 616, 32 N. W. 633 (holding however, that defense is

**Utah.**

Contributory negligence is a matter of defense.<sup>151</sup>

**§ 770. Fellow-servants.**

The burden of proving the defense that the negligent servant was a fellow-servant of the injured servant is ordinarily on defendant,<sup>152</sup> although in some jurisdictions all servants of the same master are presumed in the first instance to be fellow-servants,<sup>153</sup> and the burden of proof of the non-existence of the relation of fellow-servants is on plaintiff.<sup>154</sup>

**§ 771. Relationship of parties.**

The burden is on plaintiff to show that the relation of master and servant existed between him and defendant at the time of the accident.<sup>155</sup>

**§ 772. Rule in Georgia.**

Under the 1909 statute in Georgia, the court has laid down the following rules as to the burden of proof where an employee sues a railroad company for personal injuries received in the service:

admissible under a general denial); *Blankavag v. Badger B. & L. Co.*, 136 Wis. 380, 117 N. W. 852.

151. *Woods v. Railway Co.*, 9 Utah, 146, 33 Pac. 628; *Smith v. Railway Co.*, 9 Utah, 141.

152. *Bjorman Fort Bragg Redwood Co.*, 104 Cal. 626; *Consolidated Kansas City, S. & R. Co. v. Osborne*, 66 Kan. 393, 71 Pac. 838; *Mobile, Jackson & K. C. R. Co. v. Hicks*, 91 Miss. 273; *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Millen v. Pacific Bridge Co.*, 51 Or. 538, 95 Pac. 196; *Patterson v. Houston & T. C. R. Co.*, 40 S. W. (Tex. Civ. App.) 442. See also *infra*, §§ 834-854.

153. *Chicago City R. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222,

100 Am. St. Rep. 216; *Mollhoff v. Chicago, R. I. & P. R. Co.*, 15 Okl. 540, 82 Pac. 735; *Kansas City, Ft. S. & M. R. Co.*, 63 Ark. 477, 39 S. W. 858. Contra, *Chicago, P. & St. L. R. Co. v. Mikesell*, 113 Ill. App. 146.

154. *Chicago City R. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222. See also *infra*, §§ 834, 854.

155. *Ringue v. Oregon Coal & Navig. Co.*, 44 Or. 407, 75 Pac. 703; *Larson v. Centennial Mill Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904. But proof of employment several years prior to the accident raises the presumption of continuance. *Southern Pac. Co. v. Wellington*, 36 S. W. (Tex. Civ. App.) 1114.

“(a) If it does not appear that the plaintiff was himself connected with the transaction from which the injury flowed, and if it appears that he was hurt through the running of the defendant’s cars or machinery, or by the act of some fellow-servant, the presumption authorized by Civil Code 1910, § 2780, comes to his aid, and he makes a *prima facie* case merely by showing that he was damaged through one of the methods specified. If the damage did not ensue from one of the causes specified in the Code section just cited, the plaintiff must prove the defendant’s negligence without the aid of the presumption.

(b) If the plaintiff himself was connected with the transaction through which his injury ensued, he cannot rely solely upon the statutory presumption to make out his case. If the transaction is not one as to which the statutory presumption applies, he must prove the negligence by some affirmative proof, but need not go further and negative his own contributory negligence.

(c) If the transaction in which the plaintiff was damaged was one as to which Civil Code 1910, § 2780, applies, and the plaintiff was himself a party to the transaction, he may make a *prima facie* case by proving either of two additional things: (1) That he did not bring about the injury by his own carelessness, amounting to a failure to exercise ordinary care; or (2) that the defendant or its other servants were in fact negligent in one or more of the respects charged in the petition. The defendant, taking at this stage the burden of reply, can successfully defend by disproving either of these propositions, or by proving that, notwithstanding it or its servants were guilty of negligence, the plaintiff, by the exercise of ordinary care, could have avoided the consequences.

(d) If it appears, either by affirmative proof or by presumption, that the defendant was negligent, and it also appears that the plaintiff was somewhat at fault (but less at fault than the defendant), the plaintiff may nevertheless go to the jury, and may recover (unless it appears that his injury was brought about by his own carelessness, amounting to a failure to exercise ordinary care, or that by the

exercise of ordinary care he could have avoided the consequences of the defendant's negligence), and in such cases the jury may diminish the damages in proportion to the amount of negligence attributable to the plaintiff."<sup>156</sup>

156 *Wrightsville & T. R. Co. v. Tompkins*, Ga. App., 70 S. E. 955. Under sec. 3033 of the old Code, alone, an employee of a railroad company would not be entitled to recover damages for an injury sustained by him, caused by the negligence of other employees of the company, since without sections 2083 and 3036 of the old Code he would be under the common law rule. Section 3033 puts the burden upon the company in all cases where damage is done by the running of its trains, etc., to make it appear that its agents have used all ordinary and reasonable care and diligence. Construing these sections together, their true intent and meaning is, that while the company must prove that its agents have used proper care and diligence, it is necessary for the employee who sues to show that the injury was caused without fault or negligence on his part. In such a case, the contest is between an employee and the company on account of alleged negligence on the part of other employees. This construction makes it incumbent on both sides to show the discharge of their duties; on the part of the plaintiff, that he was without fault or negligence to entitle him to recover, and on the part of the company, that its agents and other employees were not wanting in care and diligence. *Campbell v. Atlanta & R. A. L. R. Co.*, 53 Ga. 488, 56 Ga. 586; *Rowland v. Cannon*, 35 Ga. 105;

*Sears v. Central R. & B. Co.*, 53 Ga. 630; *Central R. & B. Co. v. Roach*, 64 Ga. 635; *Thompson v. Central R. & B. Co.*, 54 Ga. 509. Yet it was subsequently stated that the rule of liability of a railroad company for negligence is not the same in the case of an employee as in the case of a passenger. In the case of an employee no presumption of negligence on the part of the company arises from the accident alone, as it does in the case of a passenger. But the plaintiff must at least show that the employee was using due care. The decisions which allow a partial recovery against a railway company for negligence, notwithstanding the contributory negligence of the employee or person injured, do not apply to the case of an injury sustained by an employee of the company, who must be free from fault, or he, or his representative in case of his death, cannot recover. Where it is shown that the company itself is at fault, then the presumption is that the employee was not at fault, or, where it is shown that the employee was free from fault, then the presumption would arise that the company was at fault, and the onus would be on the defendant to remove that presumption by showing proper diligence. The doctrine of contributory negligence does not apply in the case of an injury sustained by an employee. He must be free from fault, and, if the injury is sustained by him in

consequence of any fault or negligence on his part, he cannot recover. *East Tenn. V. & G. P. R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941. In an action against the defendant railroad company for injuries to an employee, caused by the negligence of a co-employee, the court instructed that, "to make a *prima facie* case, the plaintiff must prove either that he was not to blame or that the company was. The company, in replying, may defend successfully by disproving

either proposition, that is, by showing either that the plaintiff was to blame or that the company was not. By blame I mean the want of due diligence." The measure of diligence which the law imposes upon railroad companies in reference to employees, and in the conduct of employees in reference to their company, is ordinary diligence or common prudence. It was held there was no error in the instruction. *Central R. Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279.

# CHAPTER III.

## ADMISSIBILITY OF EVIDENCE.

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| <p><b>Sec.</b></p> <p><b>773.</b> Admissions and declarations.<br/> Declarations made at time of accident.<br/> Declaration of agent sent to obtain statement as to accident.<br/> Admission not made in performance of duty.</p> <p><b>774.</b> Admissions and declarations of co-employees and of injured servant.<br/> Statements as to condition of appliances.<br/> Voluntary exclamations of pain and suffering.<br/> Time intervening between accident and declaration.<br/> Declarations of deceased.</p> <p><b>775.</b> Custom and customary methods.<br/> Customary method of performing an act.<br/> Rules and customs of operating trains.<br/> Custom may be shown as aiding to interpret contract of employment.<br/> Illustrations of rule.</p> <p><b>776.</b> General notoriety.</p> <p><b>777.</b> Defects at other places.</p> <p><b>778.</b> Conditions prior and subsequent.</p> <p><b>779.</b> Other accidents at same place, from same appliance, and from same cause.<br/> Not admissible to show negligence but to prove defect or notice.<br/> Evidence as admissible to show others had not been injured.</p> | <p><b>Sec.</b></p> <p><b>780.</b> Other manifestations of same defect in appliance or like appliance.</p> <p><b>781.</b> Other negligence of defendant.</p> <p><b>782.</b> Repairs or changes after accident.<br/> Substitution of new for old appliance.<br/> Rule applies to change of method.<br/> Warning subsequently given.<br/> Evidence admissible for certain purposes.</p> <p><b>783.</b> Expert and opinion evidence.<br/> Whether particular act or conduct was negligence.<br/> Opinion evidence as to point jury are to decide.<br/> Opinion evidence as to whether situation was perilous.<br/> Competency of expert.<br/> Application of rules.</p> <p><b>784.</b> Speed of trains.</p> <p><b>785.</b> Models, plats and diagrams.</p> <p><b>786.</b> Instruction and warning.</p> <p><b>787.</b> Injury to witness at same time and place.</p> <p><b>788.</b> Existence of insurance.</p> <p><b>789.</b> Carlisle and other mortuary tables.</p> <p><b>790.</b> Evidence as to contributory negligence.</p> <p><b>791.</b> Evidence as to communications with deceased where employee or opposing party dead.</p> <p><b>792.</b> Evidence as corresponding with pleading.</p> |
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### § 773. Admissions and declarations.

The declaration of an agent made at the time of a particular transaction which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against the principal as a part of the *res gestae*; but it is equally settled that the declarations of an agent, made after the transaction is fully completed and ended, are not admissible. The declarations of officers of a corporation rest upon the same principles as apply to other agents.<sup>157</sup>

The rule seems to have been extended, in a particular case, in allowing such declarations where they were to the effect that the agent had previous knowledge.<sup>158</sup>

But this seems to be exceptional. Thus, it was held, that evidence that the defendant's superintendent, the day after an accident, stated to a third person that he knew of the defective condition of the dock, which caused the injury to an employee, and was repairing it, but had not reached the place of the accident, was inadmissible.<sup>159</sup>

The fact that the captain of a mine was, with respect to under ground operations, the alter ego of the employer, did not have the effect to make his admissions before the coroner's jury as to the safety of the mines, binding upon the employer, in an action for injuries to an employee, not being within the scope of his agency.<sup>160</sup>

Declarations or admissions of an agent must be at or so near the time of the accident as to form a part of the *res gestae*, to be admissible in evidence. Thus a declaration of a superintendent made after an accident had occurred, that if the machine had been in proper condi-

157. *Huntingdon, etc., R. Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 419; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

158. *Baker v. Alleghany Val. R. Co.*, 95 Pa. St. 211, 40 Am. Rep. 634.

159. *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572. See

also *Wilson v. Dunreath R. S. Q. Co.*, 77 Ia. 429, 42 N. W. 360, 14 Am. St. Rep. 304; *Alquist v. Eagle Iron Works*, 126 Ia. 67, 101 N. W. 520.

160. *Andrews v. Tamarack Min. Co.*, 114 Mich. 375, 72 N. W. 242.



tion the accident would not have happened, was held incompetent.<sup>161</sup>

**Declarations made at time of accident.**

Where, however, an agent in charge of the work at the moment of the accident declared that he expected it, it was held that evidence of such declaration was admissible as part of the *res gestae*, upon the question of defendant's knowledge of the condition of the appliance or unsafe condition of the place.<sup>162</sup>

And where the question was whether a witness had heard any expression from one claimed to be a vice principal, at the time of the accident or immediately after it, concerning the condition of an appliance, it was held proper as a part of the *res gestae*.<sup>163</sup>

**Declaration of agent sent to obtain statement as to accident.**

The declaration of an agent sent by the defendant to obtain a statement of the circumstances of an accident is inadmissible in evidence, being mere hearsay.<sup>164</sup>

**Admission not made in performance of duty.**

The admissions of an agent or general manager of a corporation, not made in the performance of his duty as an agent or officer, are not admissible in evidence in an action against the corporation by an employee to recover for personal injuries sustained.<sup>165</sup>

**§ 774. Admissions and declarations of co-employees and of injured servant.**

The extent to which the admissions of an agent or vice-principal are admissible has been considered. We now consider the extent to which the admissions and declara-

161. *Shaffer v. Haish*, 110 Pa. St. 575, 1 Atl. 575.

162. *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290.

163. *Mullan v. Philadelphia, etc., Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2.

164. *Doyle v. St. P. M. & M. R. Co.*, 42 Minn. 82, 43 N. W. 787.

165. *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471, 48 N. E. 623. See also *Lee v. St. Louis, M. & S. R. Co.*, 112 Mo. App. 372.

tions of employees are admissible, including those made by the injured employee. To be admissible they must have been made under such circumstances and conditions and at such time as to have been a part of the *res gestae*. Thus a mere statement by an employee occupying a superior position to the employee injured, in effect that it was a part of the plaintiff's duty to examine cars as he was doing at the time he sustained the injury complained of, is but hearsay, and hence not admissible.<sup>166</sup>

So a report made by the plaintiff to his employer, in compliance with a rule, as to how his injuries were received, and his letters making claim for damages, are not admissible in his own behalf.<sup>167</sup>

The declarations of a section foreman as to the condition of the track, not made at the time of the accident, the cause of injury as alleged being a defect in the track, cannot bind the master. It is not a part of the *res gestae*; nor is it admissible as an expression of an opinion on the ground that he had notice of the condition of the track. Notice to him should be proven, either by calling him as a witness or by calling some one who gave him notice or heard it given to him.<sup>168</sup>

However, declarations of an engineer upon the spot at the time of the accident, as to matters connected therewith, is admissible as part of the *res gestae*.<sup>169</sup>

It has been held that declarations of a foreman in charge of the room where plaintiff was working, made immediately after the accident and while plaintiff was lying on the floor, tending to show the negligence of the foreman, were inadmissible.<sup>170</sup>

166. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

167. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

168. *Worden, Admr. v. Hu-*

*meston & S. R. Co.*, 72 Ia. 201, 33 N. W. 629.

169. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

170. *Richstain v. Washington Mills Co.*, 157 Mass. 538, 32 N. E. 908.

**Statements as to condition of appliances.**

It may also be shown by a witness, what he told a superintendent as to defective conditions, as where a superintendent was told by him that he was afraid to work under a crane which subsequently fell, as tending to show that the attention of the company was called to the fact that the appliance was not safe, and was such as would cause a prudent man to inspect or make some inquiry of the employee for the cause of the danger.<sup>171</sup>

**Voluntary exclamations of pain and suffering.**

It seems that evidence of the voluntary exclamations which are natural concomitants and manifestations of pain and suffering are still admissible where they form a part of the *res gestae*, but complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being a part of a calculating policy on the part of the person injured, cannot properly be regarded as a part of the *res gestae*.<sup>172</sup>

**Time intervening between accident and declaration.**

With respect to the time intervening between the accident and the declaration, to constitute such a declaration a part of the *res gestae*, no definite time can be stated, but it must as a rule depend upon the character of the transaction itself. However, such declarations are not to be deemed a part of the *res gestae* simply because of the brief period intervening between the accident and the making of the declaration. The declaration itself must have related to the transaction as constituting a part of the *res gestae*, and must have been so connected with it as to distinguish it from a mere narrative of a past occurrence. This distinction is well illustrated in a leading case where declarations of an engineer as to the speed of a train when an accident happened, made between ten and thirty minutes after the accident occurred, was offered in evi-

171. *Ashley Wire Co. v. Mercier*, 163 Ill. 486, 45 N. E. 222.

172. *Kennedy v. R. C. & B. R. Co.*, 130 N. Y. 654, 29 N. E. 141.

dence. It was held that it was in its essence the mere narrative of a past occurrence, and not a part of the *res gestae*.<sup>173</sup>

The modern doctrine, it is said, has relaxed the ancient rule that declarations to be admissible as part of the *res gestae* must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.<sup>174</sup>

#### Declarations of deceased.

In an action brought by the father as administrator, where his son was killed while in the employ of the defendant, it was held that the declarations of the deceased to a co-employee as to the cause of the injury, made a few minutes after it occurred, in a room adjoining the scene of the accident, was competent as a part of the *res gestae*.<sup>175</sup>

A statement, however, made by an injured employee some time after the accident and before his death, it was held, was not competent as evidence.<sup>176</sup>

173. *Vicksburg & Meridean R. v. O'Brien*, 119 U. S. 99. See also *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894.

174. *Justice Field in Vicksburg & Meridean Rd. v. O'Brien*, 119 U. S. 99; *Hanover Railroad Co. v. Coyle*, 55 Penn. St. 396; *Hooker v. Chicago, M. & S. P. R. Co.*, 76 Wis. 542; *Felt v. Amidon*, 43 Wis. 467; *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590; In *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, the question propounded to a witness was as to whether he heard the engineer say anything as to how he came to run over the child. This conversation was within a few

moments after the child was killed. It was said: "There can be no doubt that what the engineer said about the accident was a part of the *res gestae*. The idea of the *res gestae* presupposes a main or principal transaction, and the *res gestae* mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."

175. *Christianson v. Pioneer Fur. Co.*, 92 Wis. 649, 66 N. W. 699.

176. *Lendberg v. Brotherton Iron M. Co.*, 75 Mich. 84, 42 N. W. 675.

### § 775. Custom and customary methods.

In former chapters the effect of a general custom upon the question of the exercise of ordinary care in respect to the master's duties, owing by him to his servant, has been considered. The competency of evidence as to customary methods is quite generally recognized, where the issue is the exercise of due care in the performance of duty.<sup>177</sup>

With respect to the master's duty in furnishing appliances, so far as character and kind are concerned, the question of general use has been fully considered under the chapter relating to appliances, and by the great weight of authority it appears that evidence as to such general use is not only competent but conclusive of the question of ordinary care. There is more of conflict upon the question whether the master is bound to adopt such as are in general use, but, upon authority as well as in reason, no such duty is required so long as those furnished are suitable and reasonably safe, and where evidence has been held admissible as to the character and kind of appliances in use elsewhere, where its purpose is to show negligence on the part of the master, it has generally been where there was a question whether those furnished by the master were suitable and reasonably safe, under circumstances where it may have a bearing upon the subject.<sup>178</sup>

Thus it was held that evidence was not admissible to show how the dock in question compared with the ordinary docks used for shipping lumber and shingles. The court very properly say: "The inquiry is not whether the dock was as good as others which were used for like purpose but whether it was reasonably safe for the defendant's

177. *Goodnow Mills v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Martin v. Railway Co.*, 94 Cal. 326, 29 Pac. 645; *Richmond & D. R. Co. v. Jones*, 92

Ala. 218, 9 So. 276; *Kolste v. Railroad Co.*, 32 Minn. 133, 19 N. W. 655; *Kelley v. Railway Co.*, 28 Minn. 98, 9 N. W. 588; *Doyle v. Railway Co.*, 42 Minn. 82, 43 N. W. 787; *Georgia Pac. R. Co. v. Propst*, 83 Ala. 526, 3 So. 764.

178. *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872.

employees to work upon." The condition of the dock was in question, and not the character of the structure.<sup>179</sup>

**Customary method of performing an act.**

Evidence as to the customary method of doing a particular act is ordinarily admissible upon the question of the exercise of ordinary care. However, a negligent act will not be excused by the fact that it is customary. Proof of custom, however, is evidence but not conclusive as to whether the act is negligent.<sup>180</sup>

But what persons customarily do under a similar circumstance has no application as a test of ordinary care, where the act is so obviously dangerous as to constitute negligence as matter of law.<sup>181</sup>

**Rules and customs of operating trains.**

Matters of common knowledge do not require proof, but where otherwise are proper subjects of proof to determine the question of negligence. Thus the rules and customs which govern the running of railroad trains are not matters of common knowledge, but are proper subjects of proof.<sup>182</sup>

**Custom may be shown as aiding to interpret contract of employment.**

While a usage or custom cannot be given in evidence to relieve a party from his express agreement or to change a contract certain in its terms, yet it has its legitimate place in aiding to interpret the intention of the parties to a contract, the real character and purpose of which is to be ascertained, not alone from express stipulations, but also from general implications and presumptions arising from the nature and character of the employment. It was therefore competent to show as to who attended to reporting missed holes in blasting operations in a mine in order to show as a question of fact what the assigned, assumed

179. *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586.

180. *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665.

181. *Douglas v. Chicago, M. & St. P. R. Co.*, 100 Wis. 405, 76 N. W. 356.

182. *Kansas City, M. & B. R. v. Webb*, 97 Ala. 157, 11 So. 888.

or customary duty, of shifts of men, was, and also what the general custom among the miners of the camp, who used the same drill and powder that the injured employee used when injured, and what the duty of a pusher was in caring for the safety of his men.<sup>183</sup>

#### Illustrations of rule.

Upon the question of reasonable care, the employer is entitled to show that the appliance was put up or act done in the usual way.<sup>841</sup>

On the other hand, it is proper to show, in an action for negligence based upon unsafe appliances, by men familiar with the work, that a certain implement was proper and generally used for the kind of work in which the servant was engaged, and that such implement was not furnished him. The plaintiff should have been permitted to show that cant hooks were the proper appliances for moving piles.<sup>185</sup>

So it was held competent to show that there was no other awning on the road like the one which caused injury to an employee by brushing him from the train while the train was running by it.<sup>186</sup>

And evidence of what a witness knew from his experience on various roads, concerning the general custom as to a brakeman's duties in obeying the orders of his conductor is admissible, where it does not appear that the printed rules furnished to defendant's brakeman contained any rule on this subject.<sup>187</sup>

Likewise, evidence that it was customary for brakemen to walk in front of moving cars to adjust couplings, is admissible though no rule on that subject has been promulgated.<sup>188</sup>

183. *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815.

184. *Burns v. Sennett & Miller*, 99 Cal. 363, 33 Pac. 916.

185. *Anderson v. Illinois Cent. R. Co.*, 109 Ia. 524, 80 N. W. 561.

186. *Nugent v. Boston & C.*

*M. R. Corp.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

187. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa, 509, 43 N. W. 303.

188. *De Cair v. Manistee & Grand Rapids R. Co.*, 133 Mich. 578, 95 N. W. 726.



But evidence of the custom in other factories as to boxing machinery was held to be immaterial.<sup>189</sup>

Other illustrations are given in the note below.<sup>190</sup>

189. *Rooney v. Newell, etc., Cordage Co.*, 161 Mass. 153.

190. In an action by a brakeman who alleged that his injuries were caused by a want of ballast in a part of the side track, it was held that it was competent to prove that it was not unusual for railroad companies to have in use unballasted side tracks. Such evidence is competent on the question of what vigilance was required of a brakeman under such circumstances. The court say: "We have often decided that travelers when about to cross or walk on a railroad track, are required by common prudence to look and see whether any train is approaching. It would seem that a brakeman about to change links when the train is in motion, must be required by common prudence to look, if he can, and see what kind of a track he is to pass over." Again: "Surely he had no reason to assume or suppose that this side track was ballasted unless by the custom of railroad companies, such tracks were very generally if not universally ballasted." The court after stating further the duty of the servant under such circumstances, concludes by saying: "And if it (the track) be not ballasted, ordinary care plainly requires that before attempting to change the links he should cause the moving cars to halt, and wait until they are at rest before venturing upon the undertaking." *Pennsylvania Co. v. Hankey*, 93 Ill. 580.

**COAL HEAPED UPON TENDER.** Where coal was heaped upon a tender and an employee on the track was injured by a lump falling and rebounding, striking him, it was held that negligence could not be predicated upon the fact that the coal was thus loaded, where it appeared that such manner was usual and customary. *Atchison, T. & S. F. R. Co. v. Croll*, 3 Kan. App. 242, 45 Pac. 112.

**CONDUCTOR, SETTING BRAKES.** The negligence charged being that of the failure of the conductor to set the brakes and stop a detached portion of the train which moved forward causing the accident, evidence that it was customary for conductors of such trains to set the brakes on the caboose and stop such portion of their trains, was proper. *Pearl v. Omaha & St. Louis R. Co.*, 115 Ia. 535, 88 N. W. 1078.

**CONSTRUCTING AND FILLING TRACKS.** Evidence as to the usual custom of constructing and filling railroad tracks is admissible in an action by an employee complaining of defect, to show whether defendant used ordinary care in the construction of the particular track at the point in question. *Hall v. Chicago, R. I. & P. R. Co.*, 140 Iowa, 30, 116 N. W. 113.

**CROSSINGS, MANNER OF LAYING PLANKS.** Evidence held competent as to the manner in which planks at crossings were usually laid, on the question of ordinary care. Such evidence while competent is



not conclusive against defendant on the question of negligence of the master. *Kelley v. Railway Co.*, 28 Minn. 99, 9 N. W. 588.

**COUPLING CARS.** In the absence of a rule as to the method of coupling cars, it is competent to show the custom and duty of employees in making couplings. *Louisville & N. R. Co. v. York*, 128 Ala. 305, 30 So. 676.

**EMPLOYMENT OF BOYS.** It was said: No usage to employ boys of tender years to perform duties involving the personal safety of others, and which requires the exercise of a good degree of judgment and discretion, and constant care and watchfulness, will justify such employment unless the boy is in fact competent to perform such duties. *Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. W. 475.

**GETTING ON AND OFF FOOT BOARD.** Evidence as to a custom of getting on and off foot boards of moving engines while switching in yards other than defendant's, was held to have been admissible as bearing on the question of the negligence of the engineer employed. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. 503.

**GUARDING OPENING IN FLOORS.** Evidence of the usage of builders as to the guarding the openings in floors of buildings in process of construction, was held to be competent upon the question of whether an experienced carpenter, injured by falling through such an opening, was in the exercise of proper care. *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 655.

**GUARDING TRENCHES.** Testimony of witnesses as to what is the

custom in other places with reference to guarding trenches which were open under horse car tracks was held to have been rightly excluded. Reference is made to *Bailey v. New Haven & Northampton Co.*, 107 Mass. 496, and *Hinckley v. Barnstable*, 109 Mass. 126, as sustaining the ruling of the court. In the former case it was held that an expert cannot be asked what is the custom of railroads in maintaining a flagman at crossings, similar to the one there in question, or at crossings where there is one track, on the ground that what was sought to be proved was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other, but was rather of a practice of railroad companies as to using or omitting a certain precautionary measure at certain crossings. The need of a flagman at a particular crossing depends upon its situation and circumstances. The practice at each crossing would therefore raise a collateral issue. In the latter case it was held that evidence that it was usual for towns in the county to leave drains uncovered was inadmissible in the absence of evidence that the plaintiff knew of such practice. *Craven v. Mayers*, 165 Mass. 271, 42 N. E. 1131.

**JUMPING FROM TRAIN.** An offer to prove that in jumping off the train at the time of the injury the employee was only doing what was ordinarily done by defendant's employees, engaged in like employment and under similar circumstances, with the knowledge and approval of defendant's officers, was

held to have been properly refused, as being an offer to show habitual carelessness and recklessness, which would not render the defendant liable. It was said, however, that it was not understood that this offer was to show that brakemen jumped on and off when the train was moving only at a "fast walk," but included that they did so without looking or being able to look where they would alight or what obstructions they would meet. *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070.

**LONG CONTINUED USE OF APPLIANCE.** Evidence that an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, is not only admissible, but, where it is not controverted, is sufficient to justify a continuance of its use without the imputation of imprudence or carelessness. *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *Laffin v. Railway Co.*, 106 N. Y. 136, 12 N. E. 599. *Burke v. Witherbee*, 98 N. Y. 562. The Massachusetts court do not adopt the foregoing rule to its full extent. Such evidence is admissible and is entitled to great weight, but is not conclusive. *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176.

**MAKING COUPLINGS.** The usual custom of making couplings on a certain kind of engines, where not confined to the custom of the particular road or at the particular place, where the custom sought to be proven is obviously dangerous, and it did not appear the defendant had adopted such custom, cannot

be shown to excuse contributory negligence. *Mayfield v. Savannah, G. & N. O. R. Co.*, 87 Ga. 374, 13 S. E. 459.

**MANNER BLOCKING RAILS.** It was held proper to show by a witness that if guard rails were properly blocked the foot of an employee could not be caught between the rails, and also that it would be impossible for his foot to be caught in the kind of blocking used by defendant, as showing the particular blocking was out of repair. *Paine v. Eastern R. Co. of Minn.*, 91 Wis. 340, 64 N. W. 1005.

**MANNER OF CONSTRUCTION OF RAILROAD CUTS.** Where the question to a witness was whether a cut was constructed as cuts were ordinarily constructed on roads running through such places, it was held that it was rightly excluded, for the reason that railroad cuts are not made upon any recognized pattern, and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead. *Union Pacific Railroad Co. v. O'Brien*, 161 U. S. 451.

**MANNER OPERATING TRAINS.** Where an employee was injured by the sudden stopping of a gravel train on which he was at work, it was held error to refuse defendant's offer to show by the engineer the manner in which the train was operated for some time prior to, and on, the day of the injury, for the purpose of showing that plaintiff was familiar with the movements

thereof. *Lake Shore & M. S. R. Co. v. Malcom*, 12 Ind. App. 612, 40 N. E. 822.

**METHOD OF FASTENING BELT.** Evidence is admissible to show that the method used in fastening belts was the usual and ordinary method, but it is improper to permit the plaintiff to show that other fastenings could have been used without proof that they were in common use. *McCarthy v. Boston Duck Co.*, 165 Mass. 165, 42 N. E. 568.

**LOOKING AFTER SAFETY OF ROOFS IN MINES.** The customary method of doing the work in which an employee is engaged is a proper matter of inquiry. This rule permits evidence of a custom in a mining district that an operating company should look after the safety of the roofs or entries to the mines and of the company's responsibility for the condition of such roofs when notified of their defects. *Taylor v. Star Coal Company*, 110 Ia. 40, 81 N. W. 249.

**PARTICULAR ACT, USUAL WAY.** Where it is within the duty or scope of the employment of a servant to perform a particular and somewhat dangerous service, evidence of the usual way in which a like service was done by a fellow-servant is competent in his behalf to show that in performing the service on a particular occasion he was in the exercise of due care. *Daley v. American Printing Co.*, 152 Mass. 581, 26 N. E. 135.

**RINGING BELL AT CROSSING.** It was held not competent for the defendant to prove that its servants usually rang the bell at a crossing, and to ask the jury to infer therefrom that it was rung at the time of the accident. Neither is

it competent for the plaintiff to prove that the defendant's servants often, or usually, omitted to ring the bell at such crossing, and to ask the jury to infer that the bell was not rung at the time of the accident. *Tuttle v. Fitchburg R. Co.*, 152 Mass. 42, 25 N. E. 19.

**RUNNING ENGINES; EXCESSIVE SPEED.** It was said that while the custom of running switch engines at an illegal and dangerous rate of speed is no defense, it is quite apparent that if the deceased knew that the engines in the yard were constantly operated at such rate of speed, and chose without objection to remain in his employment, it was entirely competent to prove the fact as bearing upon the extent of the risk the deceased voluntarily assumed. *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910. It was held that an assistant yard master was not, as matter of law, negligent in relying upon the custom of the master to operate its engine at a speed not exceeding six or eight miles an hour, where killed by this custom being violated by an engine running eighteen or twenty miles an hour, and that the engineer was negligent in running his engine at the excessive speed at such place. *Graham v. Minneapolis, St. P. & S. S. M. R. Co.*, 95 Minn. 49, 102 N. W. 714.

**RUNNING IRREGULAR OR SPECIAL TRAINS.** Proof of a general custom to run irregular or special trains, not running on schedule time, is competent as affecting the question whether it is negligence so to operate them. *Larson v. St. P. M. & M. R. Co.*, 43 Minn. 423, 45 N. W. 722.

**§ 776. General notoriety.**

Proof of general notoriety is generally admissible as tending to prove notice of a fact where such notice is a material inquiry; but it is never competent to prove the fact itself. This must be shown by other testimony.<sup>191</sup>

In volume one of this work this rule has been considered in connection with the question of the admissibility of evidence relating to the competency of the negligent co-servant.<sup>192</sup>

Evidence that the general impression among the men working in a shop was that a certain person was master mechanic on a certain date, is not admissible to prove

**SCREENING CIRCULAR SAW.** The general custom of screening a small circular saw on machines, is not established by the evidence of a single witness, that it is a custom to screen them, and that he has seen such devices or similar machines in another state, but never in the particular state. *Journeaux v. E. H. Stafford Co.*, 122 Mich. 396, 81 N. W. 259.

**UNLOADING BALES OF COTTON FROM CARS.** Proof of customary methods of unloading bales of cotton from a car, and failure to observe it, as evidence of negligence, held inadmissible. Such proof might be proper upon the question whether ordinary care was exercised. *Sincere v. Union Compress & Warehouse Co.*, 40 S. W. (Tex. Civ. App.) 326.

**USE OF ENGINE WITH SLOPING TANK.** Where it appears that the use of an engine with a sloping tank is safer than one having a square tank, evidence that a company used one with a sloping tank in one of its own yards is admissible as indicating it had knowledge of that fact. *Missouri Pacific R. Co. v. Lehmberg*, 75 Tex. 61, 12 S. W.

828; *Missouri Pacific R. Co. v. Lamotte*, 76 Tex. 219, 13 S. W. 194.

**USE OF WORN RAILS FOR SIDE TRACKS.** Evidence is competent to show that it was a universal custom of other railroads throughout the northwest to use partially worn rails for side tracks, upon the question of the care exercised. *Doyle v. St. P. M. & M. R. Co.*, 42 Minn. 82, 43 N. W. 787.

191. This rule was applied, and it was held not competent to show that the bridge in question had before been the means of killing another person, as tending to show the dangerous character of the bridge. *Louisville & N. R. Co. v. Hall*, 87 Ala. 768, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710. It seems that the court held that such notoriety of the dangerous character of the bridge, coupled with the positive evidence of the happening of prior injuries, is proper to be shown upon the question of notice on the part of the company. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

192. See *supra*, § —.

such fact, but it is competent for such men to testify as to their recollection of the time when such a person commenced to act as master mechanic, it being an admitted fact that he was master mechanic from and after a certain date; also any acts or parts of acts conducing to prove such person was acting in such capacity, with the knowledge and consent of the defendant, was admissible.<sup>193</sup>

**§ 777. Defects at other places.**

Evidence of other or similar defects is generally incompetent unless limited to those defects which caused or reasonably might have conduced to produce the injury. The mere existence of other defects in other parts of a railroad is not evidence that a similar defect existed at the place of the casualty and caused it. The exceptions to this rule are where the other defects are shown to be the result of a cause presumptively operating at the place of the casualty or where such other defects might have caused the defect which produced the injury.<sup>194</sup>

Thus, where the negligence charged as the cause of injury was in permitting a track to be and remain out of repair, in that there was a broken rail and an imperfect switch at or near the place of the accident, it was held error to admit evidence of other defects at other places in the road, where it was not shown that they had any connection with the accident.<sup>195</sup>

The Texas court, however, seem to hold otherwise, and where it was alleged that a wreck was caused by a defective track, evidence was held admissible tending to show the condition of the road bed and track, imme-

193. *Texas Mexican R. Co. v. Douglas*, 69 Tex. 694, 7 S. W. 77.

194. *Morse v. Railway Co.*, 30 Minn. 468, 16 N. W. 358; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 540, 31 Am. Rep. 321; *Louis-*

*ville & N. R. Co. v. Fox*, 11 Bush. 495.

195. *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. 358.

diately before and at the time of the wreck, at other places than where the wreck occurred.<sup>196</sup>

And where a brakeman was injured by a derailment, evidence as to the track's condition some two hundred yards from the point of accident was held admissible, where there was no evidence definitely fixing the place of derailment.<sup>197</sup>

196. *Taylor v. B. & H. R. Co.*, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316. This case probably came within the exception to the rule stated, as well as the two cases following. In one the plaintiff was injured by coming in contact with wires of the defendant's line which had become detached from the poles and were lying loose upon the ground. The plaintiff introduced evidence to show that the wires were down at other places or had been down within a short time previous. The court say: "We are not prepared to say that there was any error in admitting the evidence, so far as it was limited to proof of the fact that wires and poles were down at the times and places mentioned by the witnesses. It was probably inadmissible for the purpose of showing that other persons had suffered injury from the fact of the falling of the poles or wires, but the fact that the pole and wire were down at other places and times, within a few miles of the place and within a few months of the time when plaintiff was injured would seem to us competent proof upon the question of the negligence of the company in maintaining the line in a safe condition. . . . The fact that the evidence related to a time a few months before the accident or a few miles distant therefrom, would render

the proof less conclusive than though it had been related to a time a few days before the accident or a place very near, but it would not affect the competency of the proof." *Randall v. Telegraph Co.*, 54 Wis. 142, 11 N. W. 419. In the other where an employee was injured while at work on a dock, caused by reason of a defect therein, evidence was admissible showing that the dock was defective at many places by reason of holes therein other than the one causing the injury to such employee. *Propson v. Leatham*, 80 Wis. 608, 50 N. W. 586. While as stated, it is not permissible to show a particular defect at other places, similar to the defect complained of, yet it would seem to be permissible to show, if it were a fact, the general bad condition of the road or structure. Where it was charged that the roughness of the road bed was one of the contributing causes of the accident, it was held proper for the plaintiff to prove any part of the road on which the train had run on the trip in question was rough and uneven, but it was not proper to prove the general condition of the road in other respects or other localities. *Haley v. Jump River Lbr. Co.*, 81 Wis. 412, 51 N. W. 321.

197. *Louisville & N. R. Co. v. Stewart's Admr.*, 131 Ky. 665.

So where the question was whether a machine was out of alignment, the fact that other machines of a similar character on the same floor were not properly aligned may be shown, in connection with other evidence of the existence of a general cause which might contribute to the disturbance of the alignment of all the machines upon that floor.<sup>198</sup>

On the other hand, evidence of defects in the track in other parts of the mine has been held inadmissible,<sup>199</sup> as has evidence of the automatic starting of another spinning frame in the mill.<sup>200</sup>

Where it was alleged that the cause of a broken rail was a rotten tie, evidence is not admissible that defendant had allowed its roadbed and its rails to fall into bad repair generally, and at places other than that of the accident.<sup>201</sup>

#### § 778. Conditions prior and subsequent.

For the purpose of showing the condition of an appliance or place at the time of an accident, alleged to have been caused by a defect therein, evidence is admissible, in connection with proof that its condition has not been changed as to its condition at a subsequent period, and as to its prior condition, the latter for the additional purpose of showing knowledge on the part of the defendant of the alleged defect, if in fact it existed.<sup>202</sup>

198. *Standard Cotton Mills v. Cheatham*, 125 Ga. 649, 54 S. E. 650.

199. *Last Chance Mining & M. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382.

200. *Fontaine v. Wampanoag Mills*, 189 Mass. 498, 75 N. E. 738.

201. *Briggs v. East Broad Top R. & C. Co.*, 206 Pa. St. 564, 56 Atl. 360.

202. *Union Pacific R. Co. v. Edmonson*, 77 Neb. 682, 110 N. W. 650; *Pioneer Cooperage Co. v. Romanwicz*, 186 Ill. 9, 57 N. E. 864;

*Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 105 Mo. 520, 7 S. W. 476, 4 Am. St. Rep. 392. See also *Gulf Co. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151. Condition before accident, evidence held admissible. *Shea v. Pacific Power Co.*, 145 Cal. 680, 79 Pac. 373; *Island Coal Co. v. Neal*, 15 Ind. App. 15, 42 N. E. 953; *Dunekake v. Beyer*, 25 Ky. L. Rep. 2001, 79 S. W. 209; *Andrius' Admr. v. Pineville Coal Co.*, 121 Ky. 724, 90 S. W. 233; *Doyle v. Missouri, K. & T. Trust Co.*, 140 Mo. 1, 41 S. W.



On the other hand, if there have been changes or repairs in the meantime, the evidence is ordinarily not admissible.<sup>203</sup> Of course, if the condition after the accident is the result thereof, the evidence of the subsequent condition is at least insufficient to prove the defective condition,<sup>204</sup> and it has been held inadmissible.<sup>20</sup>

There is some conflict in the decisions as to whether it is necessary in all cases for preliminary proof that

255; *Davis v. Holy Terror Min. Co.*, 20 S. D. 399, 107 N. W. 374. Condition after accident, evidence held admissible. *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 600; *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Ia. 504, 47 N. W. 74; *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395, 25 Atl. 587; *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Meyers v. Highland Boy Gold Min Co.*, 28 Utah, 96, 77 Pac. 347. Where the imperfect condition of a machine upon which an employee was working was alleged to be due to defects in the pulleys used in running the machine, it was held competent, after showing that the pulleys were in the same condition at the time of the trial, that the working condition of the machine was the same, and that the speed of the engine and machinery was the same at the time when the speed was taken as at the time of the accident, to show what that speed was; that the machine and pulleys were in good condition at the time of the trial and at other times shortly before and after the accident, and that the machine worked perfectly before and ever since the accident, the admission of such evidence having a tendency to show what the condition of the

machine was, and how it operated at the time of the accident. *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972.

203. *Robinson v. Charles Wright & Co.*, 94 Mich. 283, 53 N. W. 938; *Redus v. Milner Coal & R. Co.*, 148 Ala. 665, 41 So. 634; *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396; *Jones v. N. Y., N. H. & H. R. Co.*, 20 R. I. 210, 37 Atl. 1033. Where an employee was injured while operating an elevator, the testimony of a former employee as to the condition of the elevator six months prior to the accident was held inadmissible, where it appeared the elevator had been repaired three months before the action. It was also held that negligence could not be predicated on the fact that immediately after the accident some parts of the machinery of the elevator were found and out of place and loosened, as the strain upon the machinery from the fall of thirty feet would tend to impair it. *Robinson v. Charles Wright & Co.*, 94 Mich. 283, 53 N. W. 538.

204. *Perry v. Michigan Cent. R. Co.*, 108 Mich. 130, 65 N. W. 608.

205. *Robinson v. Wright*, 94 Mich. 283, 53 N. W. 938.



conditions have not changed, especially where the evidence relates to a short time before or after the accident; but the better rule seems to be, in the latter case, that if there is no evidence of a change the evidence is admissible.<sup>206</sup>

**§ 779. Other accidents at same place, from same appliance, and from same cause.**

As to whether it is competent to show that other persons have been injured, at the same place and in the same manner, there seems to be some conflict in the authorities which, however, is more apparent than real. In the earlier cases, it was quite generally held that such evidence was inadmissible upon the ground of its collateral character, and as furnishing no legal presumptions as to the principal facts in dispute.<sup>207</sup>

Some of the earlier cases, however, and quite generally the later cases, hold that evidence of other persons having sustained similar injuries by the same means and at the same place is competent, as tending to show the defective character of the way or appliance as well as notice of such defect.<sup>208</sup>

206. See *Doyle v. Missouri, K. & T. Trust Co.*, 140 Mo. 1, 41 S. W. 255.

207. See *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Pelham*, 1 Gray, 510; *Cohen v. Hamblin-Russell Mfg. Co.*, 186 Mass. 544, 71 N. E. 948; *J. Van Edwards v. Barber Asphalt Pav. Co.*, 92 Mo. App. 221. Where the question under consideration, in a case not a master and servant case, was whether it was competent to show that other horses had been frightened at the same pile of lumber which caused fright to plaintiff's horse as competent proof to show its character in that respect, the court with some sarcasm, remarked: "The law is a practical science, and when it is appealed to to direct

what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guess work, a person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that is justly called a principle." *Darling v. Westmoreland*, 52 N. Hamp. 401.

208. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620,

So evidence of like injuries received after the injury to plaintiff, from the same machine and the same defect, is admissible.<sup>209</sup> Such evidence as to injuries, before or after, is not admissible, however, where the conditions were different.<sup>210</sup>

**Not admissible to show negligence but to prove defect or notice.**

It was held that proof of a similar accident from the same cause is not ordinarily admissible for the purpose of proving the employer's negligence at the time of the injury to an employee, but where the injury is caused by a defect in a machine or other appliance, such evidence is competent to prove the defective character of the machine and the employer's knowledge of the fact, and the jury should be so instructed when received.

37 S. E. 873; *Auld v. Manhattan Life Ins. Co.*, 34 App. Div. 491, 54 N. Y. Supp. 222; *Harrison v. New York C. & H. R. R. Co.*, 195 N. Y. 86; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Federal Lead Co. v. Lohr*, 179 Fed. 692; *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 7 Am. St. Rep. 432; *Franke v. Hanly*, 215 Ill. 216, 74 N. E. 130; *Frazer & Chalmers v. Schroeder*, 163 Ill. 459, 45 N. E. 288; *Clapp v. Minneapolis & St. L. R. Co.*, 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629; *Galvin v. Brown & McCabe*, 53 Or. 598; *Walker v. Newton Falls Paper Co.*, 111 App. Div. 19, 97 N. Y. Supp. 521; *Dorsett v. Clement-Ross Mfg. Co.* 131 N. C. 254, 42 S. E. 612; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102. Not admissible where not ascertained by master until after injury to plaintiff. *Roche v.*

*Llewellyn Ironworks Co.*, 140 Cal. 563, 74 Pac. 147. Evidence that another miner was found dead at or near the intestate is admissible as tending to show that intestate came to his death from suffocation or some other unnatural cause. *Alabama Consol. Coal & Iron Co. v. Heald*, 154 Ala. 580. It was held that evidence was competent to show that other persons had fallen upon the alleged defective sidewalk. *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Quinlan v. City of Utica*, 74 N. Y. 603.

209. *Moran v. Corliss Steam-Engine Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267.

210. *Bach v. Iowa Cent. R. Co.*, 112 Ia. 241, 83 N. W. 959; *Gustafson v. Young*, 91 App. Div. 433, 86 N. Y. Supp. 851; *Martin v. Cook*, 60 Hun 577, 14 N. Y. Supp. 329. See also *Weigand v. Atlantic Refining Co.*, 189 Pa. St. 248, 42 Atl. 132.

Thus, where the injury was received while operating a machine, caused by alleged defective construction, it was held competent to prove that on former occasions while it was being operated by another, the machine worked in a similar manner as when the employee was injured.<sup>211</sup>

So evidence is admissible to show that an appliance had on former occasions failed to properly operate, of which the defendant was charged with knowledge.<sup>212</sup>

Where an employee was injured while coupling cars, caused, as was alleged, by the overlapping of the dead woods, which was owing to the different character of the cars used, it was held that the admission of testimony showing that similar accidents had occurred on defendant's road, was error, and it was said: Where it is important to show that a defendant had notice of the dangerous character of a defect which caused the injury, testimony is competent to prove other similar accidents; such evidence is not competent where it can have no bearing upon the issue presented. In this case it did not tend in any degree whatever to the establishment or support of the plaintiff's cause of action to show that the defendant had knowledge of the dangers incident to the coupling of such cars as those which were the occasion of the plaintiff's injury.<sup>213</sup>

**Evidence as admissible to show others had not been injured.**

Whether evidence is competent to show that injury had not been occasioned others from the use of an appliance, or condition of a place, for the purpose of tending to show due care in maintaining the same or the condition thereof, is a question upon which the courts are not agreed. Some courts hold that such evidence is incom-

211. *Brewing Co. v. Bauner*, Co., 150 Mass. 125, 22 N. E. 631, 50 Ohio St. 550, 35 N. E. 55, 40 15 Am. St. Rep. 176.  
Am. St. Rep. 686.

212. *Myers v. Hudson Iron* Co., 130 N. Y. 671, 29 N. E. 320.

213. *Dye v. Del. L. & W. R.*

petent,<sup>214</sup> while others hold that such evidence is competent.<sup>215</sup>

In New York the court of appeals has sanctioned this as a rule: "When an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, its use may be continued without imputation of imprudence or carelessness."<sup>216</sup>

The supreme court of Massachusetts, in referring to this rule, reject it as such, but state that the fact (with reference to the case before them) that no person had been hurt is entitled to much weight, but was not conclusive of defendant's due care.<sup>217</sup>

So evidence that the machine was afterwards operated by others without any accident has been held not admissible.<sup>218</sup>

The Minnesota court is among those which hold that evidence is admissible showing that other accidents had not occurred from the same defect or cause complained

214. *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71; *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340; *Hudson v. Railroad Co.*, 59 Ia. 581, 13 N. W. 735; *Kirchoff v. Hohnsbehn C. S. Co.*, 123 N. W. (Ia.) 210; *Schoonmaker v. Wilbraham*, 111 Mass. 134; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71; *Hubbard v. Concord*, 35 N. Hamp. 52; *Chicago, W. & V. Coal Co. v. Brooks*, 138 Ill. App. 34; *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416; *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613; *Mueller v. Northwestern Iron Co.*, 125 Wis. 326, 104 N. W. 67.

215. *Field v. Davis*, 27 Kan. 400; *Southern R. Co. v. McLellan*, 80 Miss. 700, 32 So. 283; *String-*

*ham v. Hilton*, 111 N. Y. 196, 18 N. E. 870, 1 L. R. A. 483; *Lafflin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Burke v. Wetherbee*, 98 N. Y. 562; *T. & H. Pueblo B. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608.

216. *Stringham v. Hillon*, 111 N. Y. 196, 18 N. E. 870, 1 L. R. A. 483; *Lafflin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Burke v. Witherbee*, 98 N. Y. 562. See also *supra*, vol. 1.

217. *Myers v. Hudson Iron Co.*, 150 Mass. 136, 22 N. E. 631, 15 Am. St. Rep. 176.

218. *Republic Iron & Steel Works v. Gregg*, 24 Ky. L. Rep. 1627, 71 S. W. 900.

of. It, however, asserts that such evidence should probably only be received where there is doubt as to the existence of the defect complained of or where the dangerous character or nature of the thing complained of would not be obvious as a matter of common knowledge or experience, and thus, it reasons, if such evidence is admissible to show that what is complained of was of a dangerous character, it must be that evidence would be admissible on the other side to show that in a long continued use of such instrumentalities accidents had been unknown. That would be a proper means of showing that a thing which was not obviously dangerous was not so in fact.<sup>219</sup>

It has been held in Indiana, however, that evidence is incompetent to show that no other person has been injured in consequence of the use of the appliance or the defect. That proof of immunity of other persons from injury affords no sufficient basis for a presumption that the appliance or place is sound or safe.<sup>220</sup>

And in Iowa evidence was held inadmissible to show no accident had occurred at the particular bridge, which was improperly constructed, during the nine years of its existence.<sup>221</sup>

**§ 780. Other manifestations of same defect in appliance or like appliance.**

Evidence that the appliance or like appliances had on previous or subsequent occasions proved defective in the same manner as claimed to be defective at the time

219. *Doyle v. Railway Co.*, 42 Minn. 82, 43 N. W. 787; *Phelps v. City of Mankato*, 23 Minn. 276; *Kelley v. Railroad Co.*, 28 Minn. 98, 9 N. W. 588; *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. 358.

220. *Louisville & N. R. Co. v.*

*Kemper*, 153 Ind. 618, 53 N. E. 931.

221. *Bryce v. Chicago, M. & St. P. R. Co.*, 103 Ia. 665, 72 N. W. 780. See also *Hudson v. Chicago & N. W. R. Co.*, 59 Ia. 581, 13 N. W. 735.

of injury, has been held admissible,<sup>222</sup> although there are authorities to the contrary.<sup>223</sup>

### § 781. Other negligence of defendant.

Evidence of the negligence of defendant at another time or place is not admissible.<sup>224</sup>

So where the negligence of a co-servant is alleged, evidence that he had been negligent on other occasions is not admissible.<sup>225</sup>

In order to show the negligence of defendant, evidence is ordinarily not admissible to show other distinct acts of negligence or a custom of being negligent. On the other hand, evidence that a railroad company ordinarily keeps its tracks in good condition is not admissible.<sup>226</sup>

### § 782. Repairs or changes after accident.

Except in Kansas,<sup>227</sup> and Pennsylvania,<sup>228</sup> the mere fact that after the accident the defendant took precautions to prevent a repetition of the same, is inadmissible as evidence of negligence at the time or that the premises or appliances were not in proper condition.<sup>229</sup>

222. *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268; *Wabash Screen Door Co. v. Black*, 126 Fed. 721, 61 C. C. A. 339. The evidence of prior occurrences of a similar nature, conditions remaining the same, within two or three months prior to the accident, defects in an appliance being in question, was admissible. *Revolinski v. Adams Coal Co.*, 118 Wis. 324. Also that the machine claimed to be defective causing the injury, at a short time subsequent, while in the same condition, injured an employee. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S. E. 873. Also that other shears made by the defendant for similar use, had broken, as tending to establish

a duty of inspection. *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 45 Pac. 833.

223. *Walker v. Williamson*, 205 Mass. 514, holding that such evidence raises collateral issues and is properly excluded in the discretion of the trial judge.

224. *Snowden v. Pleasant V. Coal Co.*, 16 Utah, 366, 52 Pac. 599. The defendant having shown the care, inspection and condition of a machine causing the accident, evidence is inadmissible as to the care used with respect to other machines. *Houston v. Brush*, 56 Vt. 331, 29 Atl. 380.

225. *Robinson v. Denver City Tramway Co.*, 164 Fed. 174; *Konold v. Rio Grande R. Co.*, 21 Utah,

The reasons given for the rule are ample and convincing. Thus it is said: "If the fact admitted of such an inference (referring to an inference of defect from the

379, 60 Pac. 1021, 81 Am. St. Rep. 693.

226. Ft. Worth & D. C. R. Co. v. Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

227. Consolidated Kansas City Smelting & Refining Co., 5 Kan. App. 130, 48 Pac. 889; St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. St. Rep. 176. Contra, Cherokee & P. Coal & C. Co., 3 Kan. App. 292, 45 Pac. 100. Thus, where repairs are made upon a machine or appliance after an accident has occurred thereat, evidence of such repairs is held competent as tending to show that it was not safe at the time of the accident. Atchison, T. & S. F. R. Co. v. McKee, 37 Kan. 592, 15 Pac. 484; Railway Co. v. Retford, 18 Kan. 245; City of Emporia v. Schmidleing, 33 Kan. 485; City of Abilese v. Hendricks, 36 Kan. 196. Where the cause of injury was alleged to be the incapacity of a passage way for water, it was competent to prove that after the accident occurred the capacity of such water way was enlarged, as an admission on the part of the defendant that the water way was originally too small. But such evidence of itself does not conclusively prove negligence, nor notice of its insufficiency prior to the accident, nor that the defendant might have had notice by the exercise of proper diligence, nor that it did not exercise such diligence. St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

228. In Pennsylvania such evidence is admissible as an admission that defendant was negligent in not having before made the repairs. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; McKee v. Bidwell, 74 Pa. St. 218; Westchester & P. R. Co. v. McElwee, 67 Pa. St. 311.

229. Columbia & Puget Sound R. Co. v. Hawthorne, 144 U. S. 202; Lang v. Sanger, 76 Wis. 71, 44 N. W. 1035; Castello v. Landwehr, 28 Wis. 524; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Shinnors v. Props, Locks & Canals, 154 Mass. 168, 28 N. E. 10; Menard v. Boston & Maine R. Co., 150 Mass. 386, 23 N. E. 214; Whelton v. West End St. R. Co., 172 Mass. 555, 52 N. E. 1072; Duggan v. Champlain Trans. Co., 56 N. Y. 1; Baird v. Daley, 68 N. Y. 547; Corcoran v. Peekskill, 108 N. Y. 151, 15 N. E. 309; Nally v. Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Sievers v. Peters Box & Lumber Co., 151 Ind. 642, 50 N. E. 877; Terre Haute & Ind. R. Co. v. Clem, 123 Ind. 15, 23 N. E. 965; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Cramer v. Burlington, 45 Ia. 627; Hudson v. C. & N. W. R. Co., 59 Ia. 581, 13 N. W. 735; Morse v. Minn. & St. L. R. Co., 30 Minn. 465, 16 N. W. 358; Motey v. Pickle Marble & Granite Co., 74 Fed. 155; Howe v. Medaris, 183 Ill. 288, 55 N. E. 724; Helling v. Schindler, 145 Cal. 303, 78 Pac. 710; Leinberg v. Glenwood Lbr. Co., 127 Cal. 598; Kreider v. Wis. Riv. P. & P. Co., 110



fact of making repairs), then the fact that a person at a certain time commences using and exercising extra-

Wis. 645, 86 N. W. 662; *Davis v. Kornman*, 141 Ala. 479, 37 So. 789; *St. Louis S. R. Co. v. Plumlee*, 78 Ark. 147, 95 S. W. 442; *Aiken v. Rhodhiss Mfg. Co.*, 146 N. C. 324, 59 S. E. 696; *Morancy v. Hennessey*, 24 R. I. 205, 52 Atl. 1021; *Worthy v. Mill*, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. 690, n. s.; *St. Louis S. R. Co. v. Arnold*, 39 Tex. Civ. App. 161, 87 S. W. 173; *Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Place v. Grand Trunk R. Co.*, 82 Vt. 42, 71 Atl. 836; *Hairston v. United States Coal & C. Co.*, 66 W. Va. 324, 66 S. E. 473. The liability of the defendant must be determined from what took place at the time of the accident. *Colorado Electric Co. v. Suffers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255.

**GUARD TO PLANER.** It was held not error to exclude evidence that a guard to a planer was made the day after the accident, the complaint being that injury to an employee was sustained by reason of the want of a guard over the knives. *Silva v. Davis*, 191 Mass. 47, 77 N. E. 525. And the same where guards placed at the side of an elevated tramway to prevent cars from falling. *Barber Asphalt Paving Co. v. Odasz*, 60 Fed. 71.

**MOTORMAN, DISCHARGE OF.** Evidence is inadmissible to show the discharge of a motorman after an accident for the purpose of proving that his employer considered he had been careless or was incompetent. *Hewitt v. Tainton St. R. Co.*, 167 Mass. 483, 46 N. E. 106.

**REMOVAL OF MACHINERY.** It was error to admit evidence as to the removal of certain machinery, the alleged negligence being its location subsequent to the injury complained of. *Meyers v. Concord Lbr. Co.*, 129 N. Car. 252, 39 S. E. 960.

**FORMER DECISION TO THE CONTRARY IN MINNESOTA OVERRULED.** The Supreme Court of Minnesota in several decisions has held such evidence competent, but in *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358, it overruled its former decisions and stated that upon principle they were wrong; not for reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principal, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person, it is said, "may have exercised all the care which the law required, yet in the light of his new experience, and after unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, and the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."



ordinary care in a given case may be used against him to prove that before such time he had failed to use reasonable and ordinary care."<sup>230</sup>

And again: "To show the fallacy of the rule (speaking of a contrary one adopted by the trial court), it is only necessary to say that the gang way and saw guard might have been out of repair to an extent only that could not have caused the injury or rendered the defendants liable, and yet may have been afterwards repaired. The defendants were entitled to that presumption and therefore subject to no other."<sup>231</sup>

#### Substitution of new for old appliance.

A change made, substituting an entirely new apparatus, is no indication that the earlier one was defective, nor are changes made after an accident evidence of negligence in the use of the former.<sup>232</sup>

Nor is evidence of the substitution of a new for an old block (in frogs), for the purpose of originating an inference or an implied admission of negligence, because of failure to make substitution at an earlier period, admissible.<sup>233</sup>

Or that subsequent to an injury caused by the operation of a piece of machinery made of iron, defendants

230. *Castello v. Landwehr*, 28 Wis. 524.

231. *Lang v. Sanger*, 76 Wis. 75, 44 N. W. 1095. Evidence to the effect that the switch engine by which plaintiff was injured had been repaired since the accident, was held to be inadmissible. The ground upon which such testimony should be excluded was said to be two fold. 1st, That the making of repairs to a piece of machinery after an accident had occurred, has no legitimate tendency to show that such piece of machinery was not in an ordinarily safe and fit condi-

tion for use before such repairs were made. 2nd, Because the admission of such evidence for the purpose showing that defendant had been negligent, had a strong tendency to discourage employers in making alterations and repairs. *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. 595

232. *Domney v. Sawyer*, 157 Mass. 418.

233. *Hipsley v. Railroad Co.*, 88 Mo. 348; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 1, 16 S. W. 227.

substituted another machine made of brass and that they run this at a lower rate of speed.<sup>234</sup>

**Rule applies to change of method.**

Evidence that a changed method of performing work was adopted after an accident is inadmissible,<sup>235</sup> as is evidence that changes had been made in the guard of a machine,<sup>236</sup> or evidence as to a new method as to stopping a train at a certain station for orders.<sup>237</sup>

So the fact that after an injury to an employee working about a machine, removing shells therefrom while in motion, the master issued orders that the power should be turned off such machine while doing such work, is insufficient to establish negligence in not issuing such orders before.<sup>238</sup>

**Warning subsequently given.**

It was held an error to permit plaintiff to prove that, subsequent to an accident, defendant posted notices at its works warning all employees at work on its lines and circuits to quit work at four o'clock. It was said that the liabilities of the defendant must be determined from what took place before and at the time of the accident; what it did afterwards, by way of precaution to avoid future accidents, should not be construed into an admission by it of a previous neglect of duty.<sup>239</sup>

**Evidence admissible for certain purposes.**

Although such evidence is not admissible, except in Kansas and Pennsylvania, to show negligence in maintaining the appliances or place in unsafe condition, yet it has been held admissible, in a number of cases, for other purposes. For instance, where defendant has

234. *Lowe v. Elliott*, 109 N. R. Co., 143 Mich. 125, 106 N. W. Car. 581, 14 S. E. 51. 715.

235. *Filter v. Iowa Tel Co.*, 129 Ia. 610, 106 N. W. 7.

236. *Lally v. Crookston Lbr. Co.*, 82 Minn. 407, 85 N. W. 151.

237. *Moon v. Pere Marquette*

238. *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. 180.

239. *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255.

shown that the appliance was in good condition some time after the accident, plaintiff may show that it had been repaired in the meantime.<sup>240</sup>

So the fact that a defective appliance was repaired after an accident may be shown upon the question of what was broken, and how, and what was wanting, although improper for the purpose of showing the employer was negligent in not making repairs and alterations before the accident.<sup>241</sup>

Such evidence is also competent to show that the property where the servant was injured was owned by or was under the control of defendant.<sup>242</sup>

The contention being that a strict compliance with the statute requiring the blocking of frogs and guard-rails would endanger the operation of the trains, the fact that subsequent to the accident in question the company did block the particular guard rail, might be shown to negative the contention of the defendant.<sup>243</sup>

It was held by the Washington court, to show that a saw in a mill could have been advantageously guarded, evidence that changes were made on it, immediately after the accident, was competent.<sup>244</sup>

It seems that the Kentucky court held that the fact that the end of a bolt which had become loosened from the nut which held it, was battered down, after the accident, could be proved to show that the defect might have been cured by due care.<sup>245</sup>

### § 783. Expert and opinion evidence.

It is deemed not necessary and not within the scope of this work to consider in detail the rules as to the admis-

240. *Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

241. *Norris v. Atlas Steamship Co.*, 37 Fed. 426.

242. *Ferrari v. Beaver Hill Coal Co.*, 102 Pac. (Oreg.) 1016.

243. *Cincinnati H. & D. R. Co. v. Van Horne*, 69 Fed. 139. See also *Gulf, C. & S. F. R. Co. v. Dar-*

*by*, 28 Tex. Civ. App. 413, 67 S. W. 446.

244. *Thompson v. Issoquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588. See also *Young v. Hahn* (Tex. Civ. App.), 69 S. W. 203.

245. *Champion Ice Mfg. & Cold Storage Co. v. Carter*, 21 Ky. L. Rep. 210, 51 S. W. 16.

sibility of opinion and expert evidence, which are applicable in all actions and which do not depend on the nature of the action. At the same time, it is proper that the application of a few of the rules should be stated in this connection. Opinion evidence may be that of an expert or of a non-expert. In the one case the witness states a conclusion from his knowledge of certain facts although he is not an expert. In the other case, the witness need have no knowledge of the facts in the case except as contained in a hypothetical question, or from hearing the testimony in the case.

An expert is one who by practice or observation has become experienced in any science, art or trade.<sup>246</sup>

It was said it is only when the fact to be established partakes so far of the nature of science as to require the course of previous habit or study to the attainment of the knowledge of it, that the opinion of experts can be received. If the relation of facts and their probable results can be determined without special skill or study, the facts themselves must generally be given in evidence and the conclusions or inferences must be drawn by the jury. The difference in proving what is the usual way of doing an act and proving that a particular way is sufficient or the contrary, is apparent.<sup>247</sup>

However, the scope of expert evidence is not restricted to the field of science, art or skill, technically speaking, but extends to every subject in respect to which one may derive by experience special and peculiar knowledge.<sup>248</sup>

**Whether particular act or conduct was negligence.**

It is settled that whether any particular act of a plaintiff or defendant was negligence or whether due care required a particular thing to be done, are not matters of expert testimony. They are matters of judgment and common experience to be determined by jurors upon the facts and circumstances of the case.

246. *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737.

247. *Cahow v. Chicago, R. I. & P. R. Co.*, 113 Ia. 224.

248. *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081.

Thus, where an expert was asked if particular acts stated were a sufficient precaution, in his experience in the particular mine.<sup>249</sup>

The rule is based upon the ground that where the facts in a case can be placed before a jury, and they are of such a nature that jurors generally are as competent to form opinions in reference to them and draw inferences from them as witnesses, the opinion of experts cannot be received in evidence as to such facts.<sup>250</sup>

**Opinion evidence as to point jury are to decide.**

Opinion evidence proper to be given as to the very point the jury is to decide, is confined to cases where such point is clearly within the field of expert evidence, and the opinions offered are based on undisputed facts, or assumed facts warranted by the record.<sup>251</sup>

**Opinion evidence as to whether situation was perilous.**

The rule allowing opinion evidence as to whether a particular situation is perilous, does not extend beyond those situations where the jury, having all the facts presented to them as clearly as practicable, cannot form an opinion which is as reliable as that of an expert.<sup>252</sup>

**Competency of expert.**

A witness cannot testify as an expert until he first qualifies himself as such.<sup>253</sup>

249. *Berquist v. Chandler Iron Co.*, 49 Minn. 511, 52 N. W. 136. See also *Camp v. Hall*, 39 Fla. 535, 22 So. 792.

250. *Overby v. Railway Co.*, 37 Va. 524, 16 S. E. 813.

251. *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081.

252. *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081.

253. The opinion of an expert who neither knows or can know

more about the subject matter than the jury, and who must draw his deductions from the facts already in possession of the jury, is not admissible. *Lineoska v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577.

**WITNESS FAMILIAR WITH WIRE CABLES AS TO THEIR SAFETY.** A witness familiar with wire cables from working about and with them for many years and who has repaired elevator cables, is competent to testify on the question of the safety

### Application of rules.

It is improper to allow a witness to be asked if the appliance in question was a safe one, since that question is the one to be decided by the jury and not the subject of expert testimony.<sup>254</sup>

It is not proper to admit the testimony of expert witnesses as to what appliances are safe or unsafe. The jury is the judge of the safety of the appliance actually used. The safety of other appliances is immaterial.<sup>255</sup>

of a partly worn cable, although he has not constructed an elevator. *Stomne v. Hanford Produce Co.*, 108 Ia. 137, 78 N. W. 841.

**FIREMAN AS TO NECESSITY OF SAFETY SWITCH.** In an action against a railroad company to recover damages for negligence resulting in the death of a locomotive engineer in its employ, it was held a fireman was not a competent witness to testify as an expert, as to the necessity of a safety switch at the place of injury. *Ballard v. New York, etc., R. Co.*, 126 Pa. St. 141.

**EXPERIENCED RAILROAD MEN AS TO BLOCKING OF SWITCHES.** It is competent for railroad men to show their experience as such, and to testify that switches were blocked before and after the accident in railroad yards, where they worked. *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 364, 18 S. W. 977.

**EXPERIENCED MECHANICS AS TO ADAPTATION OF APPLIANCE FOR ITS USE.** One who is well acquainted with the use of a mechanical appliance and has had a large experience in using it, though not familiar with its construction, is competent to testify as to whether such appliance was reasonably adapted for the purpose for which it was used and also as to its condition at the time of the accident. *Alabama,*

*Connellsville C. & C. Co. v. Pitts.*, 98 Ala. 285, 13 So. 135.

**EXPERIENCED TRAINMEN AS TO METHODS.** A trainman of experience is competent to testify as to whose business it is to make up trains, and as to what conductors generally do when trains are turned over to them. *Price v. Railroad Co.*, 38 S. Car. 199, 17 S. E. 732. And also as to the effect of a car heavily loaded or empty running over a switch improperly set. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714. A conductor on defendant's road may testify as to how freight trains are made up on such road and when the duty of a yard master ceases and that of the conductor commences. *Price v. Railroad Co.*, 38 S. Car. 199, 17 S. E. 732. Also one who has been a conductor of an electric street car for two months is competent to testify within what distance such a car going at a specified rate of speed can be stopped. *Watson v. Railway Co.*, 53 Minn. 551, 55 N. W. 742.

254. *Walker v. Williamson*, 250 Mass. 514.

255. *Lemberg v. Glenwood Lbr. Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; *Hune v. Kile*, 98 Fed. 49.

Nor whether a platform was unsafe by reason of its being too narrow for a station agent in doing his work.<sup>256</sup>

It was held, however, that an expert may state his opinion as to whether a pulley constructed like the one in question was safe or unsafe, for the purpose for which it was used.<sup>257</sup>

And also that an expert might testify whether a particular device for operating a circular saw was reasonably safe.<sup>258</sup>

An expert may be permitted to express an opinion that an eye bolt was not sufficient to hold the strain to which it was subjected. Their testimony should be limited to descriptive facts from which the jury may draw the conclusion.<sup>259</sup>

Opinions of witnesses as to whether a stock car is a dangerous place for a person to ride is not admissible.<sup>260</sup>

Opinions of machinists as to whether a shaft would be more dangerous if jagged and split at the end are not admissible.<sup>261</sup>

Opinions of experts as to whether a certain arrangement of machinery was dangerous, where the facts are such that the jury, after they are explained, are competent to form an opinion, are not admissible.<sup>262</sup>

Nor as to whether it was not more dangerous to ride upon a cross beam in front of the engine than on top of the cars.<sup>263</sup>

Opinions as to whether or not the fencing of the track at the point in question, by putting in cattle guards

256. *Henion v. N. Y., N. H. & H. R. Co.*, 79 Fed. 903.

257. *Wabash Screen Door Co. v. Block*, 126 Fed. 721.

258. *King v. King*, 79 Kan. 584, 100 Pac. 503.

259. *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608.

260. *Lawson v. Railway Co.*, 64 Wis. 447, 24 N. W. 618.

261. *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 489, 18 L. R. A. 124.

262. *Freeberg v. St. Paul Plow Works*, 48 Minn. 99, 50 N. W. 1026. See also *Marks v. Harriett Cotton Mills*, 135 N. C. 287, 47 S. E. 432.

263. *Warden v. Railroad Co.*, 97 Ala. 277, 10 So. 276, 14 L. R. A. 552.



and using fences, would endanger the safety of defendant's employees, are not admissible.<sup>264</sup>

The opinion of a yard master that the method of coupling cars, adopted by a servant, was careless, dangerous and not the best way, is inadmissible.<sup>265</sup>

Experts cannot testify or give their opinion as to whether a scaffold was put up rightly.<sup>266</sup>

Nor as to whether the manner in which a brake was inspected was sufficient.<sup>267</sup>

Nor as to the skill possessed by an engineer.<sup>268</sup>

Nor as to whether a person could walk between an obstruction and a building with safety.<sup>269</sup>

Nor as to whether a person could have heard the engine blowing off steam just before the accident when it does not appear that the witness was either in or near the place where such person was at the time.<sup>270</sup>

Nor, where the witness is not an expert, as to whether the train could have been stopped in time to have avoided the accident had it been run slower.<sup>271</sup>

Nor as to whether or not a railway company was ordinarily careful in keeping its tracks in good condition.<sup>272</sup>

Nor as to whether it was negligent for an employee of a railroad company to ride on the ladder of a car.<sup>273</sup>

Nor as to whether, if an engineer had paid attention to signals and stopped his train, an employee would have been killed.<sup>274</sup>

264. Toledo, St. L. & K. C. R. Co., 5 Ind. App. 547, 32 N. E. 793.

265. Suse v. Railroad Co., 39 Fed. 487.

266. Maner v. Ferguson, 17 N. Y. Supp. 349.

267. Schneider v. Railroad Co., 133 N. Y. 583, 30 N. E. 752.

268. Butler v. Railroad Co., 87 Ia. 213, 54 N. W. 211.

269. Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732.

270. Chicago, M. & St. P. R.

Co. v. O'Sullivan, 143 Ill. 48, 32 N. W. 398.

271. International & G. N. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

272. Ft. Worth & D. C. R. Co. v. Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

273. Johnston v. Railway Co., 23 Oreg. 94, 31 Pac. 283.

274. Kendrick v. Railroad Co., 89 Ga. 782, 15 S. E. 685.



Nor as to whether an engineer had time to signal the approach of the engine, and whether if he had done so, the deceased would have had time to get off the track.<sup>275</sup>

Nor as to whether an elevator bin was safe or unsafe.<sup>276</sup>

Nor as to whether a witness who heard no signal of an approaching train could have heard it had it been given.<sup>277</sup>

Nor on cross examination of the witness who has stated that he heard no signal, as to whether it might have been given and he not have heard it.<sup>278</sup>

Nor as to whether a person was careless at the time of receiving his injury.<sup>279</sup>

Nor as to whether the backing of the train causing injury was done carefully and without negligence.<sup>280</sup>

Nor as to whether, at the time of the accident, it occurred to the witness that the accident happened by reason of the darkness or by reason of plaintiff's inattention to the step being there.<sup>281</sup>

Nor whether the manner in which a wheel in a tackle block was properly secured in the block in suitable repair.<sup>282</sup>

Nor whether, in the opinion of an expert railroad man, an inspector would have discovered the defects, which consisted in the rottenness of the wood on a car at the place where a ladder was attached, if the car had been examined.<sup>283</sup>

Nor as to whether the manner of moving a heavy machine was proper.<sup>284</sup>

275. *Dowdy v. Railroad Co.*, 88 Ga. 726, 16 S. E. 62.

276. *Davis v. Railroad Co.*, 69 Hun 124, 23 N. Y. Supp. 358.

277. *Eskridges Exrs. v. Railway Co.*, 89 Ky. 367, 12 S. W. 580.

278. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

279. *McCarrigher v. Rogers*, 120 N. Y. 526, 24 S. E. 812.

280. *Central R. & B. Co. v. Ryles*, 84 Ga. 420, 11 S. W. 499.

281. *Kelley v. Railroad Co.*, 80 Mich. 237, 45 N. W. 90.

282. *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

283. *Allen v. Union Pac. R. Co.*, 7 Utah, 239, 26 Pac. 297.

284. *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081.

Nor whether an employee was "a careful, prudent and cautious engineer."<sup>285</sup>

Nor by a fireman as to the necessity of a safety switch at the place of injury.<sup>286</sup>

Nor, on cross examination, as to whether it is negligent for a person who has business to attend to on a railroad track, to be standing on the rails immediately in front of a moving car.<sup>287</sup>

Nor of the plaintiff when called as an expert witness in his own behalf to give an opinion upon the propriety of his conduct at the time of the injury.<sup>288</sup>

Nor as to what the employee's belief or understanding was as to the protection he could receive while performing his duty.<sup>289</sup>

Nor, as an expert, whether a proper inspection would have discovered an obvious defect in a car.<sup>290</sup>

Nor a witness as to whether an employee injured was a careful or careless man in guarding himself and employees from danger.<sup>291</sup>

An expert cannot testify from all the evidence given whether the plaintiff was suffering from the injury he complained of, prior to the accident upon which suit is brought, as this allows the witness to determine what facts are established by the testimony of others instead of giving only his opinion upon a state of facts assumed by the hypothetical question.<sup>292</sup>

285. *Mosnat v. Chicago & N. W. R. Co.*, 114 Ia. 151, 86 N. W. 297.

286. *Ballard v. New York, etc., R. Co.*, 126 Pa. St. 141.

287. *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 364, 18 S. W. 977.

288. *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203, 11 S. E. 605; *Mayfield v. Savannah, G. & N. S. R. Co.*, 87 Ga. 374, 14 S. E. 459. See also *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578.

289. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

290. *Gutridge v. Mo. Pac. R. Co.*, 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392; *Allen v. Union Pac. R. Co.*, 7 Utah, 239, 26 Pac. 297.

291. *Elliot v. Chicago, M. & St. P. R. Co.*, 4 Dak. 523, 41 N. W. 758, 3 L. R. A. 363.

292. *Gregory v. Railroad Co.*, 55 Hun 303, 8 N. Y. 525. Cases may be found to the contrary.

So neither plaintiff,<sup>293</sup> nor one not an expert,<sup>294</sup> can testify as to whether plaintiff was in the exercise of due care at the time of the injury.

But where it was claimed by defendant that its employee was negligent in going under a certain gate in an elevator building, the plaintiff claiming his duties required his presence there, the opinions of experienced workmen as to whether, in the ordinary course of his duties, it was necessary and proper for him to go there, were competent.<sup>295</sup>

The best or safest method of loading car wheels upon a car is not a subject of expert testimony. It is a question which any person of common intelligence and observation could as readily determine as the so called expert.<sup>296</sup>

Testimony of a witness that a person by the exercise of ordinary care could detect missing shots, was held inadmissible. It was said a witness cannot be permitted to thus invade the province of the jury and give his opinions upon the precise question which the jury are to decide as the ultimate fact in the case.<sup>297</sup>

On the other hand, it was held competent for defendant to ask a witness, who was on a hand car with deceased at the time the latter was injured by being run down by a train, and where the witness had testified to all the facts, whether the deceased had ample time to jump from the hand car before the collision.<sup>298</sup>

And it was held not error to admit the testimony of an elevator builder that he would regard as unsafe an elevator, running with a five-eighths rope, used to trans-

293. *City of Springfield v. Coe*, 166 Ill. 22, 46 N. E. 709.

294. *Brush Electric Light & Power Co.*, 103 Ga. 512, 30 S. E. 533.

295. *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297, 96 N. W. 569.

296. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

297. *Holy Cross G. M. & M. Co. v. O'Sullivan*, 27 Colo. 237, 60 Pac. 570.

298. *Quinn v. New York, N. H. & H. R. Co.*, 56 Conn. 44, 12 Atl. 97.

port iron weighing a ton, and passengers also, without a safety rope and other safety appliances.<sup>299</sup>

The testimony of witnesses who were experienced in the particular work, that in their opinion it was absolutely necessary for the plaintiff to assume the position he did in order to do the work, and that he had neither the size nor the strength to do it otherwise, was held to have been properly admitted. It was said it was not mere opinion, but a statement of knowledge of what had to be done.<sup>300</sup>

It was held that an expert might properly testify that a dump car might be in perfectly good order and still fly back by reason of the fault of those who dumped it; that he had seen it done. The latter statement served to show more clearly the value and weight of his opinion.<sup>301</sup>

It was held that a non-expert witness, after narrating the facts, might state his opinion upon such facts as to the health and mental condition of an employee who had sustained an injury.<sup>302</sup>

It was held that a brakeman who has for five years observed the make up of freight trains in a depot yard was a competent witness as to the respective duties of the conductor of the train, and other servants of the company, in making up the train and moving it off.<sup>303</sup>

A witness having sufficient knowledge may testify as to the general practice of railroads in coupling cars, and the comparative safety of different methods, but it is not competent to show that the different method of another road is better than that of defendant. It is supposed that in such matters even the skilful and experienced will frequently differ in the choice of instru-

299. *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446, 18 Atl. 637.

300. *Kehler v. Schwenck*, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. Rep. 777.

301. *Donahue v. New York, etc., R. Co.*, 159 Mass. 125, 34 N.

E. 87. See also *Commonwealth v. Leach*, 156 Mass. 99.

302. *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732.

303. *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732.

mentalities. A party should not be judged negligent for not conforming to some other method believed by some to be less perilous.<sup>304</sup>

It was held proper to permit a witness having experience to testify as to the dangers that were incident to the use of a machine, what precautions were necessary to avoid them, that the men usually employed about them were adults, and that before being set to work such men were carefully instructed in their use, where the fact was that an inexperienced lad was set to work upon such a machine.<sup>305</sup>

It was held error to refuse to permit an expert witness to give his opinion and reasons therefor as to the merits of whipping straps as signals to brakeman, and to state whether or not they were generally used on roads regarded as well managed. It was proper to exclude his opinions as to whether the defendant's road, or a section thereof, was prudently managed.<sup>306</sup>

Where there was evidence that an elevator had been put up by inexperienced and incompetent hands, that it had no safety rope or appliance, and that it had been repaired by defendant's employees, it was held that it was competent for plaintiff to introduce the testimony of an experienced elevator builder to show that the elevator without safety appliances was unsafe, and that an ordinary carpenter or machinist without any special knowledge of elevators would not be a fit person to construct, repair or put up an elevator.<sup>307</sup>

A witness shown to have the requisite skill and who has made a personal examination of the place in question, where injury was received, may, after describing it, give his opinion as to its dangerous character.<sup>308</sup>

304. *Propst v. Georgia Pacific R. Co.*, 83 Ala. 518, 3 So. 764; *Georgia Pacific R. Co. v. Propst*, 83 Ala. 518, 3 So. 764.

305. *New York Biscuit Co. v. Rouss*, 74 Fed. 608.

306. *Louisville & N. R. Co. v. M. & S.*—9

*Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

307. *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446, 18 Atl. 638.

308. *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57.

An expert in dumping cars may testify that the accident could have happened otherwise than by reason of a defect in the car, and that he had seen a car in good order fly back through the fault of those dumping it.<sup>309</sup>

Where it is impracticable to lay before the jury all the details bearing on the distance a horse car can be seen along a railroad track, the opinions of witnesses may be received.<sup>310</sup>

A competent witness may testify as to the difference in danger between using an ordinary road engine as a yard engine, with or without a flat car attached to it.<sup>311</sup>

It is proper for an expert to describe the different ways that a device can be secured so as to be safe.<sup>312</sup>

The opinion of a competent expert based upon the facts and the whole situation, that the method of constructing a cut for the purpose of underpinning or supporting a massive chimney stack, was proper, as well as his opinion as to the proper method which should have been adopted so as to render it safe for the persons working thereon, is admissible.<sup>313</sup>

It is proper to inquire whether a defect in an unsound rope could have been discovered by the use of ordinary diligence and hence the question how it can be determined whether a rope has become rotten or unsound, is proper.<sup>314</sup>

#### § 784. Speed of trains.

Questions touching the rate of speed of a moving train are not properly scientific inquiries, and are not beyond the competency of ordinary witnesses who had means and habits of observation; yet the well known liability of all common observers to be deceived as to the rate of speed of heavy trains, renders it necessary to

309. *Donahue v. Railroad Co.*, 159 Mass. 125, 34 N. E. 87.

310. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

311. *Mobile & G. R. Co. v. George*, 94 Ala. 199, 10 So. 145.

312. *Sawyer v. J. M. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 332.

313. *Finn v. Cassidy*, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877.

314. *Silveria v. Iversen*, 128 Cal. 187.

guard, as far as possible, against vague testimony which cannot be directly met or corroborated by proof of persons having actual knowledge upon the subject. Testimony of actual speed is tangible, whatever may be the value of the opinions of particular observers; but opinions on relative speed, without some standard of rapidity are of no value by themselves. Opinions of persons riding on the cars and not observing from the outside, may be received under some circumstances, but they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumed that ordinary railway travelers usually form such habits.<sup>315</sup>

The opinions of observers, to amount to anything more than a mere scintilla of evidence, must be based upon attention to the moving train at the time, with reference to its rate of speed, and ordinarily that they watched the train as it progressed, with reference to the time occupied between objects, the distance between which could be ascertained. Testimony of ordinary observers as to such rate of speed, while it may tend to show that the train was moving fast, as distinguished from a slowly moving train, would be most unreliable and unsatisfactory, and especially where their attention is not called to the subject at the time, and their opinions are based upon a vague recollection or an impression, which they seek to recall months afterwards.<sup>316</sup>

The Iowa court, and some others, have gone to great length in admitting opinions of mere casual observers, and justify it upon the ground that the jury is to judge of the weight of the evidence and it ought not to be presumed that they will attach more importance to such opinions than good judgment will approve.

It would seem the better rule would be for the court to determine, in the first instance, whether the observer's

315. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

316. *Muster v. Railway Co.*, 61 Wis. 332, 21 N. W. 223.



experience and the attention paid to the train at the time, and the conditions existing from which he could form an intelligent and reasonably accurate judgment, were such as to entitle the opinion of the witness to legal weight with the jury, to be considered by them. This is the rule as to experts ordinarily and no good reason can be urged for a departure in cases of non-experts. It does not infringe upon the province of the jury to determine the weight of testimony, but simply determines the competency of a witness to give any testimony or whether his opinions are competent evidence. These are ordinarily, in other matters, purely questions for the court. The qualification of an expert is a question of fact to be decided by the court. To permit casual observers to give an opinion in such cases, is trifling with law and justice. It amounts to nothing more than an unreliable guess. The writer has observed an array of witnesses testifying to a rate of speed, stating it to be thirty miles an hour, when the grade, weight of train and capacity of the engine were such that a rate of speed in excess of twelve miles an hour was a practical impossibility, and when at the same time small boys were getting on and off the train, with the utmost facility. A witness who has often observed bodies in motion and has seen horses trot and run, it was held, was not competent to express an opinion as to the rate of speed of a hand car seen by him immediately before it struck a vehicle upon a crossing.<sup>317</sup>

It was held proper to permit a witness who had lived near the scene of an accident, and had seen many trains pass, to give his opinion as to how many miles an hour a train was running, though it appeared he did not know how many feet or rods there were in a mile.<sup>318</sup>

317. *Mott v. Detroit, G. H. & M. R. Co.*, 120 Mich. 127, 79 N. W. 3.

318. *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771. This ruling is exceptional and to understand its full import the particular

facts should be consulted. If given full import, it is inconsistent with the prior doctrine of this court, so well expressed in *Muster v. Railway Co.*, 61 Wis. 332, 21 N. W. 223.



Testimony of a witness that a train was coming too fast and was the sole cause of the accident was held admissible.<sup>319</sup>

Evidence is properly admitted that fast mail trains can run at a rate of sixty miles an hour safely on a well ballasted track.<sup>320</sup>

The testimony of a witness as to the speed of trains was held competent where it appeared that he was a resident of the locality, was familiar with the running of trains, and had an opinion as to the speed of those in question.<sup>321</sup>

Where excessive speed of the train is alleged as the proximate cause of injury, testimony as to the rate of speed at a place one and one-half miles distant from where the accident occurred was held admissible.<sup>322</sup>

#### § 785. Models, plats and diagrams.

A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject.<sup>323</sup>

Such testimony is admissible to assist in understanding the exact condition of the place of accident and the manner in which the plaintiff was injured.<sup>324</sup>

319. *Georgia Railway Co. v. Bryans*, 77 Ga. 429.

320. *Ft. W. & D. C. R. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137.

321. *Pence v. C., R. I. & P. R. Co.*, 79 Ia. 389, 44 N. W. 686.

322. It is not proper for the court to instruct the jury, under the evidence, as a matter of law, that twenty miles or forty miles, or forty-five miles, per hour, is negligence. It is a question of fact, properly left to the jury, in view of all the evidence as to the grade and reverse curves to determine whether the rate of speed at the time was

negligence. *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41.

323. *Macy v. Barnes*, 16 Gray 161; *Hollenback v. Rowley*, 8 Allen, 473; *Ruloff v. People*, 45 N. Y. 213; *Underzook v. Commonwealth*, 76 Pa. St. 340; *Church v. Milwaukee*, 31 Wis. 512; *Dyson v. N. Y. & N. E. R. Co.*, 57 Conn. 9.

324. In this case the guard rail, the cause of the injury, was not shown in the photograph, having been removed. *Wimber v. Iowa Central R. Co.*, 114 Ia. 551, 87 N. W. 505.

Photographs, to be admissible in evidence, should be such as were taken immediately after the accident, and while conditions remained the same. If conditions have changed, then they may be admissible as to that part where the conditions have not been changed, in connection with other evidence showing the actual condition at the time of the accident.<sup>325</sup>

To be admissible, however, a diagram, drawing or photograph must be verified by proof that it is a true representation and whether it is sufficiently verified is a preliminary question of fact to be determined by the judge presiding at the trial.<sup>326</sup>

A model or diagram may be made by a party to a suit to illustrate any article of machinery involved in the issue on trial, without notice to the opposite party.<sup>327</sup>

And the general rule is that photographs stand on the same footing as a diagram or model.<sup>328</sup>

Where a model was used by a witness to illustrate how a scaffold was constructed, and there was testimony to the effect that it was a correct model, but this was disputed, and though not formally introduced in evidence the jury were allowed to take it to their room, it was said: The model became a necessary part of the testimony of the witness, to go to the jury as such. It was not used as independent testimony of the witness. It would be like a pencil drawing, made by the witness on the stand and in the presence of the jury, to illustrate and explain his oral evidence. The use of the model in this way was proper.<sup>329</sup>

325. *Bach v. Iowa Cent. R. Co.*, 112 Ia. 241; *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 572; *Moon v. State*, 68 Ga. 688; *Locke, S. C. & P. R. Co.*, 46 Ia. 109.

326. *Blair v. Pelham*, 118 Mass. 420; *Commonwealth v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116

Mass. 98; *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 33 N. E. 520.

327. *Augusta & S. R. Co. v. Dorsey*, 68 Ga. 688.

328. *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 572.

329. *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947.

§ 786. Instruction and warning.

Evidence that employees other than the injured one had been instructed or warned is not admissible,<sup>330</sup> nor is the testimony that they had not been warned.<sup>331</sup>

§ 787. Injury to witness at same time and place.

Evidence of a witness that he was injured at the same time and place plaintiff was injured, is admissible.<sup>332</sup>

But evidence of a witness injured at the same time and place that plaintiff was, that defendant had settled for his injury, is not admissible.<sup>333</sup>

§ 788. Existence of insurance.

The existence of accident insurance carried by the master to protect himself from loss from liability for injuries to his employees is not admissible in evidence.<sup>334</sup>

Furthermore, in some of the states, especially in New York, the appellate courts do not hesitate to reverse a judgment for plaintiff in case the jury are informed of the existence of such insurance either by the admission of evidence, offer of proof, or argument of counsel.<sup>335</sup>

330. *Verdelli v. Gray's Harbor Com. Co.*, 115 Cal. 517, 47 Pac. 364; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Klauffke v. Betten-dorf Axle Co.*, 125 Ia. 223, 100 N. W. 1116.

331. *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576. Where the failure to give warning to an infant servant is alleged, evidence of other employees that they never heard the master or his representative warn any one as to the danger is not admissible. *Virginia Iron, C. & C. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

332. *Missouri, K. & T. R. Co. v. Smith*, 101 S. W. (Tex. Civ. App.) 453.

333. *Missouri, K. & T. R. Co. v. Smith*, 101 S. W. (Tex. Civ. App.) 453.

334. *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510; *Herrin v. Daly*, 80 Miss. 340, 31 So. 790.

335. Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict. *Cos-selman v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Loughlin v. Brassil*, 187 N. Y. 128, 135, 79 N. E. 854; *Hordern v. Salvation Army*, 124

### § 789. Carlisle and other mortuary tables.

There being evidence that an injury is permanent, life expectancy tables may properly be admitted in evidence.<sup>336</sup>

As contained in the *Encyclopædia Britannica*, they are admissible without preliminary proof; and the same is true as to American experience tables as shown to be in general use by insurance men.<sup>337</sup>

Such tables, to be admissible, need not show the expectancy at the precise age of decedent. It is sufficient if they show the expectancy of persons approximately of that age.<sup>338</sup>

Where it appears that a plaintiff was a healthy, strong man, and his age, occupation and earning power also appears, it is competent to show the expectation of life of such a man according to the Carlisle tables of mortality. The value of such tables when applied to a particular case will depend very much upon conditions,

App. Div. 674, 676, 109 N. Y. Supp. 131; *Haigh v. Edelmeyer & M. H. Elevator Co.*, 123 App. Div. 376, 380, 107 N. Y. Supp. 936; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 384, 80 N. Y. Supp. 861. In *Hordern v. Salvation Army*, *supra*, Mr. Justice Ingraham said: "The question as to whether or not under any circumstances evidence of this kind is competent has been so often before the court and so uniformly decided that there can be now no question that under no circumstances is it proper to ask such a question. The only possible ground of asking the question is to suggest to the jury that, as the defendant would sustain no damage by a verdict against it, they should give to the injured plaintiff compensation to which under other circumstances he would not be entitled. . . .

As counsel in cases of this kind have been so often admonished as to the impropriety of suggesting either by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance, it seems to be unnecessary to say more than that such a suggestion in the presence of the jury will render any verdict that has been obtained by the plaintiff valueless, as a violation of the rule will require a reversal of the judgment."

336. *Stomme v. Hanford Produce Co.*, 108 Ia. 137, 78 N. W. 841.

337. *Pearl v. Omaha & St. Louis R. Co.*, 115 Ia. 535, 88 N. W. 1078; *Worden v. Humeston & S. R. Co.*, 76 Ia. 310, 41 N. W. 26.

338. *Pearl v. Omaha & St. Louis R. Co.*, 115 Ia. 535, 88 N. W. 1078.

such as state of health, habits of life, social conditions, etc., and the attention of the juries should be called pointedly to these qualifying circumstances.<sup>339</sup>

It is proper to permit a witness to testify that he is acquainted with tables used by life insurance companies in estimating the probable duration of life at any given age, and that the American table of mortality is used for that purpose by nearly all the companies in the United States, and in such case it is proper to admit such tables in evidence. They are not conclusive upon the question of the duration of life. The physical condition of the injured person at the time next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and probably other facts, properly enter into the question.<sup>340</sup>

It was held that the testimony of an actuary as to the probability of the duration of life of a healthy man of a certain age, and the value of an annuity for the life of such person, calculated upon the basis that he earned a certain stated sum of money per annum, is not admissible where the injury is only partial. The rule seems to be that where death results from the injury, or where the evidence tends to show that the earning capacity of the party is entirely destroyed, such testimony is admissible, but otherwise not.<sup>341</sup>

#### § 790. Evidence as to contributory negligence.

Where contributory negligence is relied on as a defense, it is, as already stated, ordinarily an affirmative defense to be proved by defendant. On the other hand, evidence is admissible on behalf of plaintiff to show that he was not negligent, such as evidence as to the orders of the master, assurances of safety, promise to repair, etc.

If the employee is killed in the accident, and no one witnessed it, evidence as to the health, habits, sobriety

339. *Steinbrunner v. Pittsburg, etc., R. Co.*, 146 Pa. St. 504. See also, *Sauter v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 50.

340. *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897.

341. *Texas Mexican R. Co. v. Douglas*, 69 Tex. 694, 7 S. W. 77.

and prudence of the deceased is admissible in his behalf.<sup>342</sup>

Evidence of the carelessness of the injured servant on other occasions is ordinarily not admissible,<sup>343</sup> nor is the evidence that he had frequently been discharged by other railroad companies.<sup>344</sup>

If defendant relies on the servant's disobedience of a written rule, he should introduce such written or printed rule in evidence,<sup>345</sup> subject to the rules relating to secondary evidence, and such evidence need not be preceded by evidence that plaintiff had knowledge of such rules.<sup>346</sup>

After proof of the existence of the rule, plaintiff may show that the rule was not a binding one because not promulgated or for any other reason, or may show habitual violation thereof.<sup>347</sup>

It has also been held that evidence was admissible, as tending to show that the injury to the employee was not brought about by his own negligence, that another employee working by the side of the one injured, who was run over by a switch engine, came so near being run over that the engine struck his foot.<sup>348</sup>

342. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113; *Overman Wheel Co. v. Griffin*, 67 Fed. 659. But see *Erb v. Popritz*, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362. Otherwise where there are witnesses to facts attending the accident. *Adams v. Chicago, M. & St. P. R. Co.*, 93 Ia. 565, 61 N. W. 1059.

343. *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Missouri, K. & T. R. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568.

344. *Wimber v. Iowa Cent. R. Co.*, 114 Ia. 551, 87 N. W. 505.

345. *Memphis & C. R. Co. v. Askew*, 90 Ala. 5, 7 So. 823, holding that all of printed rules should not be introduced.

346. *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. 233; *Indiana, I. & I. R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175.

347. *Lake Erie & W. R. Co. v. Craig*, 80 Fed. 488.

348. *Missouri Pac. R. Co. v. Lehmbery*, 75 Tex. 61, 12 S. W. 838. It would seem, however, that this case goes to the limit. Such question would necessarily present the collateral issue of the contributory negligence of such other workman.

The rules as to when evidence of custom is admissible have already been referred to,<sup>349</sup> as have the rules relating to expert and opinion evidence as to contributory negligence.<sup>350</sup>

**§ 791. Evidence as to communications with deceased where employee or opposing party dead.**

The statutes existing in most of the states, excluding testimony of a party as to statements of or transactions or communications with persons since deceased, apply to actions by a servant against a master for personal injuries.

Thus, under the Michigan statute which precludes the giving of testimony by such agents as are authorized to act for the principal in the matter with reference to which testimony is given, as to facts and circumstances equally within the knowledge of the deceased, it was held that the superintendent of a factory could not testify, in an action brought by the representatives of a deceased employee for wrongful act causing his death, as to warnings and directions given by him to such employee, but could testify as to the circumstances attending his death of which he was a passive spectator.<sup>351</sup>

**§ 792. Evidence as corresponding with pleading.**

It is well settled that if a particular act or acts of negligence are alleged in the complaint, plaintiff must prove one of such acts and cannot recover by proving some other act of negligence.<sup>352</sup>

For instance, if the complaint sets forth as the negligence relied on the acts of a superior servant, evidence is not admissible to show a defect in the machinery.<sup>353</sup>

349. See *supra*, § 775.

350. See *supra*, § 783.

351. *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297, 96 N. W. 569.

352. *Garven v. Chicago, R. I.*

& P. R. Co., 100 Mo. App. 617, 75 S. W. 193. See also *infra*, chapter on pleading.

353. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789.

So where the failure to supply a street car with specified articles is alleged, evidence as to failure to supply it with other articles is immaterial.<sup>354</sup>

So under a declaration alleging as the cause of injury, the failure of instruction and warning, but not alleging a want of repair of the machine or appliance, evidence that the dangerous character of such machine or appliance was a result of a want of repair, and that his injuries were attributable to such defect, is inadmissible.<sup>355</sup>

So if incompetency of the alleged negligent servant is not pleaded, evidence in regard thereto is inadmissible.<sup>356</sup>

354. *Mayer v. Detroit, A. A. & J. R. Co.*, 142 Mich. 459, 105 N. W. 888.

355. *Chall v. Detroit Stove Co.*, 140 Mich. 68, 103 N. W. 513; *Culver v. South Haven & Eastern*

*R. Co.*, 138 Mich. 443, 101 N. W. 663; *Telle v. Leavenworth Rapid Transit Co.*, 50 Kan. 455, 31 Pac. 1076.

356. *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351.



## CHAPTER IV.

### CHARACTER AND SUFFICIENCY OF EVIDENCE.

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**§ 793. Scintilla of evidence.**

It was said the day is past for allowing or sustaining verdicts upon a mere scintilla.<sup>357</sup>

The burden lies upon the plaintiff to prove the negligence which he alleges; and while it is true that this may be done by proof of facts from which it may reasonably be inferred that the defendant's negligence caused the injury complained of, it is equally true that a mere scintilla of evidence is not sufficient. It must be evidence having legal weight and upon which the verdict of a jury would be allowed to stand.<sup>358</sup>

The judges are no longer required to submit a case to the jury because some evidence has been introduced by the party bearing the burden of proof, unless the evidence be of such a character that it would warrant the jury in proceeding to find a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.<sup>359</sup>

The rule in West Virginia is that where the evidence is so slight, a mere scintilla, that the court should set aside an adverse verdict, it should direct a verdict.<sup>360</sup>

357. *Westerberg v. Kinzua Creek & K. R. R. Co.*, 142 Pa. St. 471, 21 Atl. 878.

358. *Nason v. West*, 78 Me. 253, 3 Atl. 911.

359. *Commonwealth v. Clark*, 94 U. S. 278.

360. An elaborate review of the cases in this country upon the question appears in *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

**§ 794. Positive and negative proof.**

Affirmative proof must be positive in character as distinguished from such as may be purely negative. Care must be taken to properly distinguish between proof of a negative and negative proof. The evidence to substantiate the former must be positive in character. A very frequent illustration of the rule arises when it is sought to establish that signals were not given of the approach of a train at a highway crossing. This fact must be affirmatively proven where relied upon as a cause for recovery. In general it is sought to be proven and established by persons who, having an opportunity to hear the signals, testify either that they did not hear or do not remember that they heard them. In some cases a distinction has been made, from the language used by witnesses, as to whether they state they did not hear or that they do not remember hearing such signals; in the former case, holding that such evidence has an element of a positive character while in the latter it is purely negative. But this is too much like a distinction without a difference, a mere play upon words, and the real questions after all are opportunity for hearing and such attendant circumstances and conditions as would ordinarily and naturally impress the fact of signals not having been given upon the mind of the witness, to such an extent that such impression would remain with him at the time he is called upon to testify as to the fact. In a well considered case, in which the question was determined, wherein the rule was fully and ably expressed and the reasoning of the court conclusive, the facts were that the plaintiff and several witnesses testified that they did not remember to have heard the engine bell ring before the plaintiff was injured, not to have seen any person or light on the forward end of the car. The conductor, engineer, foreman and the brakeman who held the lantern, each testified that the lantern was so held by the brakeman and three of them testified that the signal was given. The court say: "The testimony of the plaintiff's witnesses that they did not hear

the bell ring or did not see the lighted lantern at the head of the gravel cars, is purely negative, and its negative character is intensified by the fact which is made perfectly obvious by their testimony, that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record the credibility of the defendant's witnesses, who testified positively to the ringing of the bell, and the presence of the brakeman upon the gravel car with a lighted lantern, stands unimpeached. The jury are not at liberty to disregard their testimony, but it was their duty to reconcile the testimony of all the witnesses, if that could reasonably be done. There is no difficulty in doing so in this case. The testimony of defendant's witnesses is positive that the bell was seasonably rung and that the brakeman stood on the forward end of the leading gravel car holding a lighted lantern, and that of the plaintiff's witnesses is that although they had the opportunity to hear and see such warnings, they failed to do so. The testimony does not tend to show a single fact or circumstance which gives a positive character to the testimony of the plaintiff and his witnesses. Such being the nature of the testimony the fact that the warnings were given, was established, if not by the undisputed evidence, certainly by an overwhelming preponderance of testimony, and the jury were not justified in finding they were not given. Indeed, the negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given."<sup>361</sup>

361. Bohan v. Railway Co., 61 Wis. 391, 21 N. W. 241. Substantially the same reasoning was set forth by another court which states the rule: "The testimony of a

witness that he did not hear the signals is of itself, as against positive and direct testimony that they were given, no evidence that they were not given, but taken in con-

**Rule applied to order given.**

Where defendant and his wife testified unequivocally as to giving positive orders to a servant to do certain acts, and the plaintiff failed to deny this in express terms, but stated he did not remember having been at the defendant's house on that occasion or that such

nection with evidence showing that he could and probably would have heard them, had they been given, is sufficient to warrant the jury in finding they were not given." *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. 930. See also *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214. Substantially the same rule prevails in Illinois. *Ohio & M. R. Co. v. Reed*, 40 Ill. 47. Also in Pennsylvania (*Hauser v. Railroad Co.*, 147 Pa. St. 440, 23 Atl. 766), and many other states. In the case in Pennsylvania it was held that the testimony of the plaintiff who was proceeding over the crossing, was insufficient to raise a conflict in the testimony. In a case in the Federal Circuit Court of Appeals, it was held that negative testimony of such a nature was insufficient to present an issuable fact. It was said: "In the very nature of things, their affirmative testimony that the warning was given must be accepted or proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it, from whatever cause. There is, in such cases no conflict of evidence as to the matter in question." The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence. *Horn v. Balt. & Ohio R. Co.*, 4 C. C. A.

346, 54 Fed. 301. It was said by another court: "It is proved by the positive oath of the two individuals on the engine, one of whom rang it (the bell) and by the others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. As against positive affirmative evidence by credible witnesses of the ringing of the bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it; that their attention was directed to the fact so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear', is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." *Culhane v. Railroad Co.*, 60 N. Y. 133; *Reiney v. Railroad Co.*, 68 Hun 495, 23 N. Y. Supp. 80; *Hoffman v. Railroad Co.*, 67 Hun 581, 22 N. Y. Supp. 463.

orders were given him, it was held that a verdict for the plaintiff could not be sustained.<sup>362</sup>

**Rule applied where injured person testified she looked and listened but did not hear.**

Where a woman stepped upon the track in front of a locomotive, and her statement was that she looked and listened and did not hear signals, and six witnesses testified to the fact that signals were given, it was held that her statement was not sufficient to raise a conflict.<sup>363</sup>

**Rule applied where section man injured.**

Where the only testimony to the effect that signals were not given was that of the plaintiff, who was a section hand, injured in a collision of his car with a freight train, that he did not hear any signals of approach of the train, and it did not appear what the conditions were surrounding him at the time, and there was positive testimony by a number of witnesses that signals were given, it was held that a verdict for the plaintiff could not be sustained. It was said: "There are cases in which negative testimony might, in the face of positive testimony, sustain a verdict; but in such cases not only must the comparative credulity of the witnesses be placed in the balance, but there must be something by which means of knowledge can be weighed. Where such testimony is relied upon for a verdict, it devolves upon the party introducing it to show that he was where he would probably have heard the bell had it been rung or the whistle had it been sounded."<sup>364</sup>

**Rule applied where engineer on rear engine of double header injured.**

A verdict was sustained which found that an engineer upon the rear engine of a double header, during a blind-

362. *Covel v. Harvey*, 12 So. (Miss.) 462.

363. *Hauser v. Cent. R. Co. of New Jersey*, 147 Pa. St. 440, 23 Atl. 766.

364. *International & G. N. R. Co. v. Arias*, 10 Tex. Civ. App. 190, 30 S. W. 446.

ing snow storm, was negligent in not hearing a danger signal from the head engine, he having testified he did not hear it, because certain others testified that they did hear it, there being no proof of persons on the forward engine that it was given, the engineer having been killed.<sup>365</sup>

**Kansas rule qualified.**

In Kansas the same reasoning is given in the rule declared, with the exception that it is qualified by the statement that such testimony is of little weight.<sup>366</sup>

**Rule not approved by Iowa and Missouri courts.**

In some cases the rule has not been strictly applied. The Supreme Court of Iowa, and the courts of some other states, hold such evidence competent and proper to be considered by the jury. The Iowa and Missouri cases are very liberal in respect to the character and nature of the evidence to be submitted to a jury.<sup>367</sup>

**Rule founded upon common knowledge and experience.**

The country being traversed by a net work of railroads, the signals from engines have become familiar sounds. Those whose dwellings border upon railroad tracks, and those who are accustomed hourly to hear the blasts of whistles and the ringing of bells, and see passing trains, ordinarily take no note of them. They hear and see, and yet no impression is made. How few persons who have been accustomed to the old clock upon the shelf take note as it strikes the hours that mark the passing time? How few could truthfully say that it did not strike? To give any weight to testimony of persons who have the opportunity merely to hear it strike, yet testify they did not hear it, is the merest

365. McGrath v. Great Northern R. Co., 80 Minn. 450, 83 N. W. 413.

366. Kansas City, F. S. & G. R. Co. v. Lane, 33 Kan. 702, 7 Pac. 587.

367. Hanlon v. Missouri Pac. R. Co., 104 Mo. 381, 16 S. W. 233; Murray v. Railroad Co., 101 Mo. 236.



nonsense. They may be honest in their statement, yet it fails to prove or tend to prove it did not strike. Its only force is that they took no note of it at the time, or, if they did, it was not impressed upon the mind. Much different would be the case if a person, watching and waiting for an expected train, who was driving a horse, fractious and not accustomed to the cars, or otherwise circumstanced, so that his attention would naturally be directed to the subject of the giving of the signals. The testimony of such a witness to some extent would be positive in character as tending to prove a negative.

**Rule applied as to cause of an accident.**

Where the plaintiff testified that he was not sure whether he was caught in the belt or not, where the negligence charged was that such belt was uncovered, and none of his witnesses saw the accident, and a witness for the defendant testified that he saw the accident, and showed that the belt had nothing to do with it, it was held that a verdict should have been directed for the defendant.<sup>368</sup>

**§ 795. Sufficiency of evidence to show negligence.**

The difficult question oftentimes arising in cases where there is an entire absence of direct proof as to the cause of an accident, or the manner in which a person lost his life, is to determine what may be legitimately inferred from the circumstances which appear from the evidence. Negligence must be shown by affirmative proof. The facts upon which it is to be inferred as a reasonable inference must be established by such proof. Negligence is not presumed; therefore it follows that the existence or non-existence of the facts cannot be left to conjecture. "Judicial determination must rest upon facts and legal liability must be determined by the law in application of the facts. These rules will not exclude circumstantial

<sup>368</sup>. Ford v. Anderson, 139 Pa. St. 265, 21 Atl. 18.



evidence, for such evidence is often the strongest; but such evidence after all must establish facts. When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being closely shown by competent evidence; and it is incumbent upon such a plaintiff to furnish such evidence to show how and why the accident occurred. Some fact or facts by which it can be determined by the jury and not left to the conjecture, guess or random judgment, upon mere supposition without a single known fact."<sup>369</sup>

This language was used, where the only fact that was established by the evidence was that an employee of the defendant was found bruised and dead, in a hole cut through the floor in defendant's mill, and in which was water about six feet deep. How he came there was left entirely to inference from circumstances attending his employment.

Unquestionably every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case and not, in the absence of evidence, upon mere inference, conjecture and personal experience.<sup>370</sup>

369. *Sorenson v. Menasha Paper & Pulp Co.*, 56 Wis. 338, 14 N. W. 446. That negligence was proximate cause may be shown by circumstantial evidence. *Lunde v. Cudahy Packing Co.*, 139 Iowa, 688, 117 N. W. 1063. And it was said, in the absence of evidence that the defendant's agent knew of plaintiff's inexperience and ignorance of the dangers connected with a machine, that the jury cannot be permitted, in deciding the question, to rely upon mere inference, conjecture, and their own personal experience. *Sherman v. Menomonie Lumber Co.*, 77 Wis. 14, 45 N. W. 1079. The fact of an

accident, as between employer and employee, carries with it no presumption, as in the case of injury to a passenger, of negligence on the part of the employer and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. It is not enough to show that he may have been guilty of negligence, the evidence must point to the fact that he was. *Patton v. Texas & Pacific R. Co.*, 179 U. S. 658; *Minty v. Union Pac. R. Co.*, 2 Idaho, 437, 21 Pac. 660, 4 L. R. A. 409.

370. *Sherman v. Menomonie Riv. Lbr. Co.*, 77 Wis. 14, 25 N.

In order to prove a fact by circumstances, there should be positive proof of the facts from which the inference or conclusion is drawn, and not left to rest in conjecture, and when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from those facts.<sup>371</sup>

An inference cannot be drawn from a presumption, but must be founded upon some fact legally established.<sup>372</sup>

As has been stated, circumstantial evidence consists in reasoning from facts which are known or proved in order to establish such as are conjectured to exist, but the process is fatally vicious if the circumstances from which it is sought to deduce the conclusion depends itself upon conjecture.<sup>373</sup>

The plaintiff must prove something which warrants the inference of negligence on the part of the defendant, and not base his case upon facts just as consistent with care and prudence as with the opposite.<sup>374</sup>

Two or more causes which might have produced the injury.

Where it is necessary to show a certain state of facts, it is not sufficient to prove two or more different states of case, one of which may be sufficient, but either of which may, equally, under the testimony, have existed.<sup>375</sup>

As was stated by the court, in a case where the injury was occasioned from a loose step on an engine, which was firm at the start upon the trip, but was found loose at the conclusion of the trip, there being no evidence as

W. 1079; *Micare v. Monroe Stone Co.*, 154 Mich. 362, 117 N. W. 939; *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081.

371. *Ruppert v. Brooklyn H. R. Co.*, 154 N. Y. 90, 47 N. E. 971.

372. *Douglas v. Mitchell*, 35 Pa. St. 443; *Cosgrove v. Pitman*, 103 Cal. 768, 37 Pac. 232.

373. *Ruppert v. Brooklyn H. R. Co.*, 154 N. Y. 90, 47 N. E. 971.

374. *Baulee v. Railroad Co.*, 59 N. Y. 357, 17 Am. Rep. 325; *Hayes v. Railroad Co.*, 97 N. Y. 254; *Railroad Co. v. Shertle*, 97 Pa. St. 450.

375. *Hughes v. Cincinnati, N. O. & T. P. R. Co.*, 91 Ky. 526, 16 S. W. 275.

to what caused the defect: "Where testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between those half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."<sup>376</sup>

And where the evidence is equally consistent with either view,—the existence or non-existence of negligence,—it is not competent for the judge to leave the matter to the jury. In such case the party has failed to establish the negligence of which he complains.<sup>377</sup>

#### Balancing the probabilities.

It has been said: "The rule that where an injury occurs that cannot be accounted for, and where the occasion of it rests wholly in conjecture, the case may fail for want of proof, should not be so extended as to result in a failure of justice or in denying an injured person a right of action, where there is room for balancing the probabilities and for drawing reasonable inferences, better supported upon one side than the other."<sup>378</sup>

This was said in reference to the cause of an explosion of nitroglycerine. And also in an action where death was caused, there being no witnesses of the accident, it was said that if the circumstances shown justify legitimate inference which brings defendant's liability within the realm of probability, rather than leaving it a mere matter of conjecture, the case is one for the jury.<sup>379</sup>

It might be inferred from the foregoing that a jury could be permitted to determine the cause of the accident, upon mere probabilities; as that one view or theory was the more probable than another. If so, the decision is of doubtful authority. The liability of the master,

376. *Patton v. Texas and Pacific R. Co.*, 179 U. S. 658.

*Chemical Co.*, 113 Mich. 582, 71 N. W. 1081.

377. *Thompson Negligence*, p. 364.

379. *Parker v. Union Station Assn.*, 155 Mich. 72, 118 N. W.

378. *Schoepper v. Hancock* 733.

as has been stated, cannot be determined upon mere probabilities, only upon competent evidence. It was stated, by a court in which the rule prevails that the employee must show freedom from contributory fault, that where there is an entire absence of evidence as to what an employee, whose injuries resulted in death was doing at the time of the accident, it is not enough to show that one conjecture in regard thereto is more probable than another, as there must be some evidence to show that he was in the exercise of due care, in order to justify a recovery.<sup>380</sup>

And where a boy, while riding on a street car, was either pushed off the car or jerked off by the defendant's carelessness, or he accidentally slipped off, while the car was in motion, it was said: "The evidence fails to show that the boy's injury was caused by any act or neglect of the defendants. If bare probabilities are to be considered, it is difficult to determine what they tend to show; and in this case the circumstances proved are insufficient to establish negligence on the part of the company. If it had been left to the jury to find whether the injury occurred through the carelessness of defendant's servants and they had found it did so occur, there is no evidence in the case sufficiently direct or positive to sustain such a finding. There must be something more than a mere probability of defendant's negligence. There must be some element of moral certainty."<sup>381</sup>

**Merely proving a condition which might have produced an injury presents no issue.**

A plaintiff fell in a night time on a defective sidewalk and was to some extent injured by the fall. On that evening and the next and following days she complained of pain in her breast, and liniments were applied. Some months afterwards it was discovered that the breast was enlarged and hardened and in the meantime had continued to be painful. Surgeons pronounced the

380. *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655. 381. *Payne v. Railroad Co.*, 40 N. Y. 8.

disease sarcoma, a form of cancer, and with their advice the breast was amputated. Experts gave it as their opinion that a blow or bruise might have been the exciting cause of the growth, but such result would only have followed in case the germ of the disease existed in the system before the injury. The court say: "While an injury by external force might have caused it to develop, it may also have developed without such cause. Before she can recover she must establish that the relation of cause and effect existed between the fall and her suffering. But when we look into the evidence we find it merely established a condition which might have been caused by an injury at the time, but whether such injury did occur is, under it, a matter of surmise. The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence and it was therefore error to submit the question to the jury."<sup>382</sup>

Something more than a probability must be shown.

From the foregoing, as well as from an array of cases, many of which follow, where the question has been considered, it is manifest that to meet the requirements of affirmative proof, something more must be shown than a mere probability of a negligent act or omission, or where the act or omission is established, something more than a mere probability that it was the direct or proximate cause of the injury. There must be some element of certainty. As stated:<sup>383</sup> "There are no facts in evidence by which the jury or any one can form a certain opinion upon the subject so as to clearly determine the question of his negligence", which amounts to an expression that the evidence required to sustain

382. *Trapnell v. City of Red Oak Junction*, 76 Ia. 744, 39 N. W. 884. It evidently was the more probable that the fall was the cause of plaintiff's suffering, and especially from the fact that no other cause appeared, other than

the possibility that the germs of the disease might have developed at that time independent of the fall she received.

383. *Sorenson v. Menasha Paper & Pulp Co.*, 36 Wis. 338, 14 N. W. 446.

a verdict based upon the negligence must be clear and reasonably certain. Mere preponderance of evidence is not alone sufficient. Preponderance only arises where there is a conflict. It does not attach always or ordinarily to the character or sufficiency of the evidence. Evidence must be sufficient to establish a fact to a reasonable certainty to satisfy a jury that it exists. As was said in a leading case: "There may have been a preponderance of evidence tending to prove such facts or some or all of them, and yet the evidence be quite insufficient to prove those facts."<sup>384</sup>

It may be correctly stated as a rule that proof of an alleged act or omission as causing injury is not sufficient to establish it as the cause, so long as other causes exist and were present, which might as well have caused it. Surmise and conjecture cannot supersede proof. There must exist some degree of certainty. There need not be absolute certainty or freedom from reasonable doubt but sufficient must be shown to overcome or more than balance any presumption that other causes may have produced it.

**Presumption in case of death that employee was in exercise of due care as showing negligence on part of master.**

Some courts have given decisive effect to a slight presumption and permitted jurors to draw therefrom an inference as to a defect or cause of injury, contrary to the well settled rule that an inference cannot be drawn from a presumption but must be founded on some fact legally established. Thus it was said: "The law, out of regard to the instinct of self-preservation, will presume *prima facie* that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care and the presumption is not overthrown by the mere fact of the injury," and

384. *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48; *Dunbar v. McGill*, 64 Mich. 676, 31 N. W. 578.

such rule so declared was applied where a conductor, in some manner not known, fell or was thrown from a car, the stirrups of which on one side had been removed, and a jury permitted to infer therefrom the cause of the accident and a cause chargeable to the master.<sup>385</sup>

This presumption, though quite often stated, is a violent one, and quite generally contrary to practical experience. However, there is a countervailing presumption of equal force. The presumption of freedom from contributory negligence where a servant is found dead at his place of work, is balanced by the presumption of freedom from negligence on the part of the master.<sup>386</sup>

#### Proof beyond a reasonable doubt.

It is elementary that the negligence of the master, or that such negligence was the proximate cause of the accident, need not be proved beyond a reasonable doubt.<sup>387</sup>

#### Application of rules.

The rule that negligence cannot be presumed from the fact of injury, laid down in a multitude of cases, has been applied, or sought to be applied, in many cases; for instance, where the injury was caused by the absence of key in draw bar;<sup>388</sup> appliance failing to oper-

385. *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124, 77 N. W. 1016.

386. *Allen v. Kingston Coal Co.*, 212 Pa. St. 54, 61 Atl. 572.

387. *Lunde v. Cudahy Packing Co.*, 139 Iowa, 688, 117 N. W. 1063.

388. Where the cause of the injury was the key which held a draw bar in place falling out of its place, and such keys were fastened ordinarily by a split ring, which was missing after the accident, and it appeared that by a jar of the cars such ring might be caused to break

and the key work out, and that the car had run forty miles from its starting place before the accident happened, and that if the ring was out the least jar would cause the key to jump out, and the contention was that a proper inspection would have discovered the absence of the ring, it was held that the absence of the key after the accident being consistent with the exercise of due care by defendant, it afforded no presumption of negligence, or that the key was not properly fastened when the train was made up, and it was error for the court



ate;<sup>389</sup> defect in appliance;<sup>390</sup> boiler exploding;<sup>391</sup> brake becoming loose;<sup>392</sup> bridge timber breaking;<sup>393</sup> defect in

to submit the question to the jury. *Kincaide v. Oregon, S. L. & U. N. R. Co.*, 22 Oreg. 35, 29 Pac. 3.

389. Where an appliance failed to operate, and the cause was unexplained, it was said that negligence cannot be presumed from the fact of injury, and though it may be inferred from the facts proved, it cannot be based upon guesses or conjecture. *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004.

390. Where the alleged negligence was a defective appliance, a defective brake and trap door on a car raised above the level of the roof, proof of the existence of the defects was not sufficient to take the case to the jury as the plaintiff was bound to show by a preponderance of the evidence a casual connection between the defects and the injury. Such evidence must be direct or circumstantial. It must be stronger than merely consistent with plaintiff's theory. The manner in which plaintiff was killed was merely conjectural. *O'Connor v. Chicago, R. I. & P. R. Co.*, 129 Ia. 636, 106 N. W. 161. See also *Clark v. A. Garrison Foundry Co.*, 219 Pa. St. 426, 68 Atl. 974.

391. Where an engineer and fireman were both killed by the explosion of the locomotive boiler, and no witnesses observed what the engineer did immediately before the explosion, evidence as to his general reputation as a careful and competent engineer and a sober man, was admissible upon the ques-

tion of the exercise of ordinary care. Evidence of non-experts was admissible as to the conditions of the boiler with respect to old or new breaks or cracks, in the broken stay bolts of the engine. Also as to when the locomotive was built, the number of miles run since, and the fact it had once collided with another engine, and these, with other circumstances, were sufficient to carry the case to the jury upon the question of the master's negligence in respect to the condition and safety of the boiler. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435.

392. Where an employee was injured by the brake becoming loose under the car, and it was uncertain whether the key which held broke or dropped out, and there was no evidence to determine whether it would have been discovered, if the defect existed, by ordinary inspection, it was said that the several questions could not be left to the mere conjecture of the jury. *Philadelphia & Reading R. Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286.

393. An employee was injured by the breaking of one or two timbers which formed a sort of a bridge over a run. The evidence disclosed no defect in them when put in, and, if sound originally, five years was not sufficient to cause dangerous decay or weakness. It was suggested that the timbers might have become weakened by rock falling upon the bridge. It was said: The mere fact of such



car;<sup>394</sup> car moving from siding on main track;<sup>395</sup> derrick

injury is no evidence of fault. It may be guessed or surmised that there was negligence somewhere, and one juror may guess that it was in want of a careful selection of timber, another that it was in the want of subsequent inspection, or in the want of care to prevent rocks falling on the bridge, but the case affords no safe ground for anything beyond conjecture, and if the master can be held liable, under the circumstances, on mere guess or inference, the rule that an employee assumes the ordinary risks of his employment will be wholly done away with. *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240.

394. It was held proper for the jury to determine whether the cars left the track by reason of their defective condition, though it appeared there was a broken axle which would have produced the wreck. It was said: There was evidence tending to show that the axle was broken by the speed of the train over the rough road. *Swadley v. Missouri Pacific R. Co.*, 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366. Under the Ohio statute, evidence that a car was defective and that an employee was injured by such defect, is *prima facie* negligence. A switchman was injured while attempting to place his foot on the step of a car, and he testified that in such attempt his foot struck the side and slipped off and that from the way his foot hit it was slanting way back. The

car was examined the next morning and it was found one of the steps was bent under the sill. Whether such step was the one upon which the switchman attempted to mount or one on the opposite corner of the car, depended on which of two connecting tracks the car had been transferred over, there being no evidence as to this fact. It was held that a jury might reasonably infer that it was the one found defective. *O'Connell v. Pennsylvania Co.*, 118 Fed. 989.

395. Where an engineer was injured in a collision with a flat car which, half an hour previous, had run from a side track onto the main track, and stopped partly off the track, and various theories were advanced as to what caused the car to run from the siding, but there was no proof, and the jury having found that it was the wind, it was held that, while negligence might be inferred from the circumstances proved, it could not from conjecture, and the verdict was set aside. *Hewitt v. Railway Co.*, 67 Mich. 61, 34 N. W. 652. Where an engineer was found dead in his cab, and it appeared that a box car had moved on a side track, close to the main track, with which he might have come in contact, it was held that a non-suit was proper, as there was no evidence of negligence on the part of the company. *Ballard v. New York, etc., R. Co.*, 126 Pa. St. 141.

boom falling<sup>396</sup> where cause of injury is uncertain;<sup>397</sup> derailment of engine;<sup>398</sup> furnace door blowing open;<sup>399</sup>

396. There being evidence that a certain pin provided to be used in the lever bar of the spool upon a derrick, was worn, and after the accident was found out of place, this was sufficient to sustain a verdict based upon the want of repair of such derrick, causing the boom and the load it was lifting to fall and injure an employee. *Union Bridge Co. v. Teehan*, 190 Ill. 374, 60 N. E. 533.

397. It being claimed by the plaintiff that his injuries from a stick flying back from the saw he was operating was caused by a defect in the dust board in front of the saws, one end being allowed to swing loose when it should have been fastened, and there being no evidence that such defect, if it was a defect, contributed in any manner to the injury, but that it might have happened in any one of a variety of ways, a judgment for the defendants was proper. *Koslowski v. Thayer*, 66 Min. 150, 68 N. W. 973. Though no witness testified that a set screw rather than the belt caught an employee, resulting in his death, while he was attempting to replace a belt upon a pulley, there was circumstantial evidence which made it a question for the jury. *Little v. Bonsfield & Co.*, 154 Mich. 369, 117 N. W. 369.

398. There being no direct evidence what an employee who went under an engine to clean under it, was doing at the particular time of the running of another engine against the one upon which he was working, or how he came to receive his injuries, an instruction

that the jury should consider the instincts which naturally lead men to avoid injury and preserve their own lives and the presumption that they will ordinarily do so, was not error. *Morbey v. Chicago & N. W. R. Co.*, 116 Ia. 84, 89 N. W. 105. The alleged cause of the derailment being alleged defects in an engine, the injured employee or those that represent him, must show some casual connection between such defects and the accident, to warrant a recovery against the company because of its claimed negligence in failing to remedy the defects. It is not enough to indicate a state of facts from which there is a possibility the accident occurred. The facts must be such as to indicate a reasonable probability that the accident occurred from the negligent acts charged. *Peppett v. Michigan Cent. R. Co.*, 119 Mich. 640, 78 N. W. 900. An engine being derailed, evidence that the accident occurred at a cattle guard at the end of a switch, the guard being low and the timbers in it somewhat decayed which would cause it to sink under the weight of the engine and the pilot to strike the guard rail and move the switch, witnesses giving their opinion that such condition caused the derailment, it was held, made a case for the jury. *Bach v. Iowa Central R. Co.*, 112 Ia. 241.

399. Where a fireman was injured by jumping from the cab of the engine, which he was forced to do by the engine kicking, that is, the furnace door was blown open and flames forced from the furnace

defect in hand car;<sup>400</sup> defect in machine;<sup>401</sup> stone thrown from passing train;<sup>402</sup> torpedo left on track;<sup>403</sup> defective insulation of wire.<sup>404</sup>

burst into the cab, and there was no certain proof as to what caused this condition, different experts advancing theories as to what might have caused it, some of which, if the cause, would charge negligence upon the servants of the company as would make it liable, it was held there was nothing upon which to base a verdict but mere conjecture, which would not satisfy the demand for affirmative and preponderating proof. *Orth v. St. Paul, M. & M. R. Co.*, 47 Minn. 384, 50 N. W. 363.

400. An action for personal injuries alleged to have been caused to the employee of a railroad company operating a hand car by a defect in the machinery of the car from which he was thrown while turning one of the cranks, cannot be maintained, if the cause of the injury is wholly conjectural. *Clare v. New York & N. England R. Co.*, 167 Mass. 39, 44 N. E. 1054.

401. Where an employee was injured while operating a machine used for shaping iron plates by the "drop", so called, consisting of a long piece of iron, falling unexpectedly on the plaintiff's hand, it was said: It was not essential to a recovery that the employee should be able to show the precise nature of the defect, if it is made to appear that the accident occurred by reason of some defective condition of the machinery, chargeable to the negligence of the employer. (What the defects were, referred to in the opinion, does not appear.) *Nelson*

*v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868.

402. An employee, engaged with others in raising and ballasting a track, was injured by stone being thrown from a passing train, presumed by its rapid movement, striking him upon the leg, breaking it. There was no proof on the part of the plaintiff tending to show where the stone came from or how and by what means it was put in motion. It was said: The cause of the accident resting on pure conjecture, without evidence tending to explain it or to connect it in any way with any negligence of the appellant, at the close of respondent's evidence, it appeared to be a case of unaccountable misadventure for which no one was responsible. *Steffen v. C. & N. W. R. Co.*, 46 Wis. 259, 50 N. W. 348. See *Morrison v. Phillips & Colby Const. Co.*, 44 Wis. 405.

403. Where an employee was walking along the track to flag a train by placing torpedoes on the track, and after going a short distance he felt his foot strike something and a heavy explosion came from under him, rendering him insensible, the judgment of the lower court was reversed in directing a verdict for the defendant upon the ground that a jury might infer that the torpedo was negligently left on the track where employees were required to work. The accident occurred in Michigan. *Brom v. Minneapolis, St. P. & S. S. M. R. Co.*, 108 Minn. 1, 121 N. W.

**Sufficiency of proof as to cause of death.**

Where a brakeman was killed and the accident was unknown until the train had proceeded some miles, and it appeared that it was a dark night and he was last seen on a car going in the direction of a flat car, to reach which he would be obliged to descend a ladder at the side of a car, and in doing so he would be in danger of contact with a ledge of rocks near the track where his body was found; also his coupling stick, and the one wound on his right side, were consistent with the theory of such contact, it was held that a peremptory instruction for the defendant was proper. That there was nothing definite as to whether he met death in this manner or by stumbling and falling. The manner of death was mere speculation.<sup>405</sup>

Where the body of a brakeman was found on the track, having been run over by the cars, and a part of his clothing was found upon a brake at the rear of the train, and it was contended that the inference to be drawn was that his fall from the car was caused by the parting of the train, it appearing, however, that the cars, when the train parted, were without brakes, it was held that there was no evidence as to the manner of his death.<sup>406</sup>

123. A car repairer threw a wrench on the car on which he was at work. It struck a torpedo lying there and exploded, resulting in injury to him. He recognized it as one of the torpedoes used by the company, but he had been unable to ascertain by whom it was placed there. It was held a mere matter of conjecture and insufficient upon which to base a verdict for the plaintiff. *Fuller v. Ann Arbor Railroad Co.*, 141 Mich. 66, 104 N. W. 414.

404. It seems to have been held, in the absence of direct proof, that a wire from which the insulation was broken, caused the acci-

dent. It evidently appeared that more than one cause might have produced it. *Thompson v. New Orleans & C. R. Co.*, 107 La. 52, 32 So. 177.

405. *Wintuskis' Admx. v. Louisville & N. R. Co.*, 14 Ky. L. Rep. 579, 20 So. 819. See also *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 955, 9 So. 566; *Ill. Cent. R. Co. v. Cathey*, 70 Miss. 332, 12 So. 253.

406. *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150, 12 So. 168. See also *Short v. New Orleans & N. E. R. Co.*, 69 Miss. 848, 13 So. 826.

Where a brakeman, in some unexplained way, fell under the wheels of an engine and was killed, and the plaintiff gave some proof of a want of repair in the track and of a defective step on the engine, it was said, in reversing a verdict for the plaintiff, that the case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or at most mere probabilities.<sup>407</sup>

So where the evidence was that just after a train loaded with gravel started down a grade, a brakeman thereon, who had been told by the conductor that the brakes were to be left set, till the bottom of the grade was reached, and who so far as it appears had no occasion to go to them till such time, was run over by the train. There was no direct evidence as to the manner of his death. His cap was found at the foot of a tree which stood eighteen inches from the side of the cars on which were the brakes. His body was sixteen feet beyond the tree. A bruise was on that side of his head which would probably have been exposed to the tree if he had taken hold of the brake to tighten or loosen it. It was held that the evidence was insufficient to submit to the jury the cause of the accident, as this was a mere matter of conjecture.<sup>408</sup>

But where a brakeman was killed by falling from a box car, on the top of which near the brakes was a large hole, and the deceased was last seen alive standing at the brake near this hole, it was held that evidence appeared from which the jury might consider that his death was owing to the hole in the top of the car.<sup>409</sup>

Where the cause of action was for the negligence of an engineer in stopping a car before signal given, there must be evidence connecting the accident and death of a brakeman with such conduct of the engineer.<sup>410</sup>

407. Philadelphia & Reading R. Co. v. Schertle, 97 Pa. St. 450.

408. Manning v. Chicago & W. M. R. Co., 105 Mich. 260, 63 N. W. 312.

409. Bromley v. Birmingham M. R. Co., 95 Ala. 397, 11 So. 341.

410. De Whirst v. Boston & Maine R. Co., 167 Mass. 402, 45 N. E. 757.

In Massachusetts the burden is upon the plaintiff to show absence of contributory negligence, and hence where a brakeman was found unconscious, lying upon the top of a car almost immediately after passing under a bridge, having been seen by the engineer a moment before, what he was doing at the moment and whether the gap in the tell tales contributed to the accident, was a matter of surmise.<sup>411</sup>

Evidence was held sufficient to furnish a reasonable basis for the inference that the death of plaintiff's intestate was caused by the negligence of defendant in directing him to fix a hot box on a freight car and then starting the train without warning before he completed the work, although there was no direct evidence as to how he met his death or where he was or what he was doing at the time.<sup>412</sup>

Where a brakeman standing on the top of a car in apparently good health, just before a train passed under a low bridge and immediately thereafter he was found lying on the top of the same car near the center in a dying condition, no evidence of wounds or bruises upon his person having been produced, the fact of his death by contact with the bridge was not established.<sup>413</sup>

The time when and the manner in which an accident happened to a railroad employee whose death occurred through the alleged negligence of defendant in starting a train, is a question for the jury where there is evidence that when last seen he was between a car and engine about to make a coupling, that he had a very brief time in which to make it; that no one saw him come out; that the coupling was made and that his body was found at about the place it was made.<sup>414</sup>

411. *Murphy v. Boston & Albany R. Co.*, 167 Mass. 64, 44 N. E. 1087, 42 Am. Rep. 240.

412. *Moore v. Northern Pac. R. Co.*, 108 Minn. 100, 121 N. W. 392.

413. *Fitzgerald v. N. Y. C. & H. R. R. Co.*, 154 N. Y. 263, 48 N. E. 514.

414. *McHugh v. Manhattan R. Co.*, 179 N. Y. 378, 72 N. E. 312.

Where in an action against the master for the death of a brakeman in attempting to couple cars, the cause of the accident rests on circumstantial evidence and it is quite as consistent that deceased stepped on loose gravel and was thrown as it was that he stepped into a depression negligently left between the tracks, and it is a mere matter of conjecture how it all happened, a verdict is rightly directed for the defendant.<sup>415</sup>

Other illustrations of the attempt to apply the general rule where the employee who was killed was a brakeman;<sup>416</sup> employee conveying heavy timbers;<sup>417</sup> em-

415. *Tibbitts v. Mason City & Ft. D. R. Co.*, 138 Ia. 178, 115 N. W. 1021.

416. In an action against a railroad company for the death of a brakeman, it appeared that the deceased was fatally injured on a dark night while attempting to couple cars at a street crossing; that one of the planks at the crossing between the rails had split off near one end, leaving a space sufficiently wide to admit a man's foot; that deceased's version of the accident, given directly after it occurred, was that "he got caught in the planking between the plank and the rail, and the brake beam pushed him back"; that blood was found on the ground close to the defect in the planking; that the deceased was picked up about two car lengths from the crossing, and that the space between the rails looked as though a body had been dragged along for that distance. Held, that it was error to refuse to direct a verdict for defendant on the ground that it was purely conjecture as to whether the deceased caught his foot or merely stumbled against the end of the planking. *Knapp*

*v. Chicago & West. Mich. R. Co.*, 114 Mich. 199, 72 N. W. 200. Where a brakeman was killed while coupling cars, no one seeing the accident, but he was found close to a defective frog, and there were indications that his foot was struck by the wheel and run over lengthwise, while eyelets of a shoe were found within three or four inches of the frog and eyelets were missing from his shoe, this was sufficient to raise a question for the jury as to whether his foot was caught in the frog. *Jones v. Flint & P. M. R. Co.*, 127 Mich. 198. The mere fact that a brakeman was killed in falling from a train composed of twelve or fourteen cars, one of which was defective in that it had no foot board, is not sufficient to warrant the inference that he fell from such car or that it in any manner caused his fall. *Rogers v. Louisville & N. R. Co.*, 88 Fed. 462.

417. There being no evidence as to how or as to the manner in which an employee received his injuries while employed to take heavy timbers from the first floor to the second floor of a building being constructed, the verdict was



ployee in mill;<sup>418</sup> employee in packing house;<sup>419</sup> employee on vessel;<sup>420</sup> railroad engineer;<sup>421</sup> fireman;<sup>422</sup> or switchman,<sup>423</sup> are set forth in the notes in connection herewith.

properly directed for defendant. *Binequiez v. Haglin*, 103 Minn. 297, 115 N. W. 271.

418. Plaintiff's intestate, an employee of defendant, was found bruised and dead in a hole which had been cut in the floor of defendant's mill, and in which was water about six feet deep. There was no evidence tending to show how he came into the hole; it rested wholly in conjecture. It was held that a non-suit was properly ordered. It was said: There are no facts in evidence by which the jury or any one else can form a certain opinion upon the subject so as to clearly determine his negligence. How then can an intelligent verdict be rendered? *Sorenson, Admx. v. Menasha Paper & Pulp Co.*, 56 Wis. 338, 14 N. W. 446. See also *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655.

419. Plaintiff's burden of proof of decedent's due care at the time he is claimed to have been wrongfully killed, is sustained *prima facie* by showing that when last seen he was acting in the line of his duty without apparent negligence and there is no living witness or direct testimony as to the manner of his death. There being no evidence as to the manner in which the decedent came to his death, only the situation after the accident, the jury were justified in finding that he came to his death by reason of an insufficient guard about a fly

wheel pit. That the lower railing guarding the pit being twenty-five inches above the floor left a space through which, upon the plaintiff's falling from any cause, his foot might slip through and come in contact with the wheel. *Lunde v. Cudahy Packing Co.*, 139 Iowa, 688, 117 N. W. 1063.

420. Where an employee of a steamship company was alleged to have fallen overboard from one of its vessels and drowned, attributable to the negligence of the defendant, and it did not appear from the evidence how or in what manner he was lost from the ship, no one having testified as to having seen him fall or seen him upon the deck, but it did appear that the iron doors of the forward port had been left open by another employee and the opening guarded only by a rope drawn across it, it was said: There is no direct proof as to how deceased met his death. There is nothing to show that he fell through the open port or that his exit from the ship was accidental. It is true a theory may be adopted which would lead to the moral conclusion that his death was accidental while in the discharge of his duties and in the exercise of reasonable care, but all this falls very short of sustaining the burden of proof under which the plaintiff rested. *Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369, 40 N. E. 507.

421. An engineer upon the forward engine of a double header was



killed by the derailment of his engine. The claim was that after it was derailed, he gave a danger signal, which was not heeded by the engineer upon the rear engine, and that if he had heard it, and reversed his engine, instead of continuing to push the forward engine, the latter engine would not, though derailed, have been overturned. There was some evidence that the engineer on the forward engine gave a danger signal a short distance from where his engine was found, that the brakes were set upon his engine, and from this a verdict was permitted to stand, that the proximate cause of the death of the engineer was the negligence of the engineer of the rear engine in not hearing such signal and hence in pushing the forward engine over, after he should have been aware that there was accident and danger. *McGrath v. Great Northern R. Co.*, 80 Minn. 450, 83 N. W. 413.

422. Where there was no proof as to how a fireman came upon the track, and no proof from which a legitimate inference could be drawn, it was held that no case was made out. It was said that conjecture cannot be allowed to supersede proof. *Borden v. D. L. & W. R. Co.*, 131 N. Y. 671, 30 N. E. 586. A fireman in defendant's employ was killed by the bursting of a joint of a steam pipe. The cause was speculative. Plaintiff's theory was that the joint was defective and to support it evidence was introduced to the effect that the joint had been leaking for some time and afterwards a crack was discovered therein of such a character that it must have existed for some time. There

was no evidence of improper construction or that the leakage itself was a signal of danger or that an inspection would have revealed the defect. The evidence was insufficient to support the theory of the plaintiff or to show negligence on the part of the defendant. The bursting may have been caused by an excessive pressure of steam or other causes not attributable to the employer. *Voight v. Michigan Pen. Car Co.*, 112 Mich. 504, 70 N. W. 1103.

In an action for the death of a fireman claimed to have been caused by the splitting of a foot board upon a switch engine, it was held that under the evidence it was a mere matter of conjecture as to whether the board split and caused him to fall or he fell from some other cause, and the board split as it went over him, and hence a verdict was properly directed for the defendant. *Powers v. Pere Marquette R. Co.*, 143 Mich. 379, 106 N. W. 117.

423. There being no direct evidence as to negligence on the part of the engineer by which a switchman was caught between the engine and mail car and crushed, it was held that from the accident and proper inferences to be drawn from the position of the car and engine and other circumstances, the engineer, after starting his engine, reversed it and backed against the car. *Rogers v. Minneapolis & St. S. M. R. Co.*, 99 Minn. 34, 108 N. W. 868. Where an employee, while riding two loaded gondola cars, was found lying upon the track underneath and about six feet from the cars he was riding, immediately after such cars had

**§ 796. Sufficiency of evidence to show want of contributory negligence.**

Where the burden of proving that the injured servant was in the exercise of due care rests on plaintiff, and the servant was killed in the accident, and there is no living witness or direct testimony as to the manner of his death, a *prima facie* case is made out by proving that the deceased, when last seen, was acting in the line of his duty without apparent negligence.<sup>424</sup>

**§ 797. *Res ipsa loquitur*.**

As already stated, ordinarily mere proof of the happening of an accident is not *prima facie* proof of negligence.<sup>425</sup>

been kicked to a switch track, there being no evidence that the cars, though driven faster than necessary to be coupled with other cars on the switch track, were driven with unusual force or speed, it was held there was not sufficient evidence to justify an inference that the switchman met his death because of any negligence chargeable to the master. *Griffen v. Minn. Transfer Co.*, 94 Minn. 191, 102 N. W. 391.

424. *Lunde v. Cudahy Packing Co.*, 139 Iowa, 688, 117 N. W. 1063. See also *supra*, presumptions.

425. The mere fact that an engine step became loose and turned with an employee thereon after the run was over, and during which it had been used several times by the engineer and fireman without noticing any defect, it appearing the step had recently been replaced and the nut screwed on tight, is not sufficient to charge the company with negligence. *Patton v. Texas & P. R. Co.*, 95 Fed. 244. Where there was a latent defect in a brake

rod, negligence did not appear from the mere fact of the defect, it appearing it was not discovered upon proper inspection. *Smith v. Railway Co.*, 42 Wis. 520.

**APPLIANCE DEFECTIVE.** The mere proof that an appliance was defective and that an employee was injured while using it, is not sufficient to prove that the injury was caused by the defect. *Plefka v. Knapp, Stout & Co. Co.*, 145 Mo. 316, 46 S. W. 974.

**BLOCK BETWEEN RAILS.** The rule that the happening of an injury is not evidence of negligence was applied where an employee was injured while pushing a huge transfer table in a pit, by reason of a block between the rails obstructing the same, such block being no part of the apparatus, and there was no proof as to who placed it there or whether it was there by accident, and a few hours before it was not there. *Murphy v. Great Northern R. Co.*, 68 Minn. 526, 71 N. W. 662.

**BRAKES.** It was held that a brakeman thrown from a car while releasing a brake could not recover

In some cases, however, where the accident is unusual, under the circumstances, and there was present some defect, act or omission as the basis of the alleged negligence, negligence has been presumed from the mere proof of the accident.<sup>426</sup>

for resulting injuries in the absence of evidence of any defect in the brake that would cause it to stick, or proof of any defect accompanying its release that would tend to throw him off. *Louisville & N. R. Co. v. Binion*, 98 Ala. 570, 14 So. 619.

**CAR CONSTRUCTION.** There being no evidence of the want of repair of a car, nor that its manner of construction was improper or unnecessarily dangerous, it was held that the question of negligent construction was one which a jury might infer from its normal condition. *Grand Trunk Railway Co. v. Tenant*, 66 Fed. 922.

**EMERY WHEEL BURSTING.** Where the alleged cause of injury was the bursting of an emery wheel, and there was no evidence that there was anything improper in the construction or setting up of the machine, or any defect in the wheel known, or which ought to have been known, to the employer, it was held that the plaintiff could not recover. *Simpson v. Pittsburg Locomotive Works*, 139 Pa. St. 245, 21 Atl. 386.

**ENGINE DEFLECTED TO SIDE TRACK.** There being no evidence that a switch was defective and caused an engine to be deflected to a siding, resulting in injury to an employee, other than an inference from the accident itself, and several other causes might have produced that condition, a charge of negli-

gence was not sustained. *Savitz v. Lehigh & N. E. R. Co.*, 199 Pa. St. 218, 48 Atl. 967.

**STONE THROWN FROM MOVING TRAIN.** The rule was applied where a section man was injured by a stone which in some manner was thrown from under a moving train. *Steffen v. Railway Co.*, 46 Wis. 259, 50 N. W. 348.

426. *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519, 39 L. R. A. 842. "Where an accident has occurred, and the physical facts surrounding it are such as to create a reasonable probability that the accident was the result of negligence, in such case, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence in conformity with the maxim, *res ipsa loquitur*. The cases are not in full accord upon this question. It is often difficult to determine when this maxim is to be applied, and its application must depend to a very great extent upon the circumstances of each case as it arises. . . . Without attempting to formulate a rule embracing every case to which the maxim is to be applied, we think it is clear from the authorities cited, that when the defendant owes a duty to the plaintiff to use a certain degree of care in respect to the thing causing the accident, to prevent the occurrence of such accident, and the thing is shown to be under the management of the de-

This doctrine of "*res ipsa loquitur*" (the thing speaks for itself) imports that the plaintiff has made out a

defendant or his servants, and the accident is such as in the ordinary course of things does not occur if those who have the management use proper care, it affords evidence, in the absence of evidence showing that it happened without the fault of the defendant, that the accident arose from the lack of the requisite care. In such case the occurrence itself, unexplained, shows *prima facie* a shortage of legal duty on the part of the defendant. This doctrine does not dispense with the rule that the party who alleges negligence must prove it, but, on the contrary, it only determines the mode of proving it, or what shall be *prima facie* evidence of negligence in a certain class of cases." *Houston v. Brush & Curtis*, 66 Vt. 331. The knot formed by the tying together of two ropes for a guy in a hoisting apparatus, having come undone during the lifting, resulting in an injury to an employee, there is a presumption of negligence, which the master who tied the knot had the burden of overcoming. The knot was tied by one of the defendants. *Folk v. Schaeffer*, 180 Pa. St. 613, 40 Atl. 401. Proof that a railroad switch was open and that a train ran into it, whereby the engineer was killed, established a *prima facie* case of negligence. *St. Louis, I. M. & S. R. Co. v. Ramsey*, — Ark. —, 131 S. W. 44. But where there is a reasonably possible theory of an injury consistent with the employer's due care in the equipment and

operation of a machine, the mere happening of the accident does not suffice to establish his negligence and liability. *Beyersdorf v. Cream City S. & D. Co.*, 109 Wis. 456. While the mere happening of an accident ordinarily is not *prima facie* evidence of negligence, yet if it be proved that the accident occurred by reason of a particular defect, if that defect be of a kind that the jury can see that there must have been negligence in not curing the defect, a *prima facie* case of negligence appears, and may be sufficient to fix the liability of the master, unless he can explain that as to the defect he had exercised due care. *Smith v. Memphis & L. R. Co.*, 18 Fed. 304. The doctrine of *res ipsa loquitur* was not applicable where it did not appear when or by whom a joist found in the wreckage of a building being torn down, was cut, almost severing it, there being no presumption that the master failed to exercise due care. It was not required of the master to make an inspection for the purpose of seeing whether anything had been done to weaken the structure. *Ferrick v. Eidlitz*, 195 N. Y. 248, 88 N. E. 33, 24 L. R. A. 837, n. s. The mere fact that a machine that is shown to have performed work properly both before and after an accident failed so to work on the particular occasion is not sufficient to justify a conclusion of negligence. *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004.

*prima facie* case without any direct proof of actionable negligence.<sup>427</sup>

The doctrine is not that, in any case, negligence can be assumed from the mere fact of an accident and injury but in these cases, the surrounding circumstances which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty and his neglect to perform it. When the facts and circumstances from which the jury is asked to infer negligence, are those immediately attendant on the occurrence, it is spoken of as *res ipsa loquitur*. When not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence.<sup>428</sup>

The doctrine of *res ipsa loquitur* is applied when the inference of negligence is required by the nature of the occurrence. If the entire occurrence could not have happened without negligence of some kind, negligence is presumed, and the burden of explanation is upon the defendant. If proof of the occurrence shows that the accident might have happened from some cause other than the defendant's negligence, such presumption does not arise, and the doctrine cannot be applied.<sup>429</sup>

Essential to application of doctrine that accident does not ordinarily occur if due care has been exercised.

One of the essential elements permitting the application of the rule *res ipsa loquitur* in favor of a plaintiff,

427. *Bien v. Unger*, 64 N. J. L. 596, 46 Atl. 593. The essential import of that doctrine is that, on the facts proved, the plaintiff has, without direct proof of negligence, made out a *prima facie* case. *Western Steel Car & Foundry Co. v. Cunningham*, 158 Ala. 369, 377, 48 So. 109.

428. *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922.

429. Thus, where decedent was

killed by the falling of a scaffold upon which he was working with another. They applied severe vertical strain to the scaffold to uncouple a pipe overhead and while doing so it fell. The court charged "under the maxim *res ipsa loquitur*, that the scaffold must have fallen because there was something the matter with it", and it was held error. *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805.

is that the accident complained of shall be of such a character as does not ordinarily occur where the party charged with responsibility has exercised the degree of care and caution required by law, to avoid such an accident.<sup>430</sup>

It is only where the structure, wall or thing which causes the injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if due care is used, that the happening of the accident is *prima facie* evidence of negligence on the part of the defendant.<sup>431</sup>

**Where unusual and unexpected accident happens.**

When an unusual and unexpected accident happens and the thing causing the accident is in one's exclusive management, possession or control, the accident speaks for itself, is itself a witness "*res ipsa loquitur*", and the fact of the accident places on the defendant the duty of showing that it was not occasioned by negligence on his part.<sup>432</sup>

The accident may be of such a character and the circumstances may be such as to cast upon the master the duty of explanation. The circumstances, however, surrounding the transaction must be such that the negligence of the master can be deduced therefrom as a natural and reasonable inference. The proof to warrant such inference must be brought forward by him who charges such negligence and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation or drawn from presumption but must be founded upon some established fact.<sup>433</sup>

430. This rule does not apply therefore to the case of an injury to an employee, a freight brakeman, by the derailling of a car upon which he was riding. No presumption arises from the mere happening of such an accident that the railroad has not discharged its obligation toward the employee. *Hensen v. Lehigh Valley R. Co.*,

194 N. Y. 205, 87 N. E. 85.

431. *Kletschka v. Minneapolis, St. L. R. Co.*, 80 Minn. 238, 83 N. W. 133.

432. *Hamilton v. The William Bancroft*, 47 Fed. 914; *Mullen v. St. John*, 57 N. Y. 568; *Western Trans. Co. v. Downer*, 11 Wall. 129.

433. See *Pierce v. Kile*, 80 Fed. 865; *Zibbel v. City of Grand Rap-*

**Rule held not applicable to complicated machinery.**

The rule of *res ipsa*, it has been held, cannot be applied to a case of complicated machinery,<sup>434</sup> but no good reason is apparent for distinguishing between such machinery and other machinery.

**Rule as applicable only where no positive proof exists.**

The rule of *res ipsa loquitur* has been held to apply only to injuries to a servant where the facts are not susceptible of direct and positive proof by living witnesses.<sup>435</sup>

If plaintiff produces other evidence than the mere fact of the accident—in other words, if there is any specific evidence, positive or circumstantial, bearing on the question of negligence—there is no necessity for the invocation of the doctrine of *res ipsa loquitur* in aid of, or to establish, a *prima facie* case.<sup>436</sup>

**Reason for rule.**

The rule is said to have had its birth and origin in the law of necessity, and that the burden of disproving negligence is on defendant where the means and instrumentalities employed by the master are peculiarly within his knowledge and under his control, and he is therefore in much better position to explain the cause of the accident than is the injured party.<sup>437</sup>

**Rule as applicable to master and servant.**

While there are cases apparently holding that the doctrine of *res ipsa loquitur* is inapplicable to cases between master and servant to recover damages for alleged negli-

ids, 129 Mich. 659, 89 N. W. 563; Fuller v. Ann Arbor Railroad Co., 141 Mich. 66, 104 N. W. 414; Baldwin v. Atlantic City R. Co., 64 N. J. L. 232, 45 Atl. 810; Missouri, K. & T. R. Co. v. Crowder, 55 S. W. (Tex. Civ. App.) 380.

434. Brien v. St. Louis Coopersage Co., 50 Mo. App. 202.

435. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 S. W. 1057.

436. Western Steel Car & Foundry Co. v. Cunningham, 158 Ala. 369, 377, 48 So. 109.

437. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 S. W. 1057.



gence,<sup>438</sup> yet the better and almost universal rule is to the contrary.<sup>439</sup>

And it is doubtful whether even the federal courts intend to hold that in no case is the doctrine applicable in an action by a servant against his master to recover for personal injuries.

### Statutory provisions.

In some of the states, statutes have been enacted under which, in certain cases, the happening of the accident is itself made *prima facie* evidence of negligence on the part of the master;<sup>440</sup> and such statutes have been held

438. *Northern Pac. R. Co. v. Dixon*, 139 Fed. 737; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91; *City of Greeley v. Foster*, 32 Colo. 292. See also *Looney v. Metropolitan R. Co.*, 200 U. S. 480; *Norfolk & W. R. Co. v. Witt*, 110 Va. 117, 65 S. E. 489.

439. *Klebe v. Parker Distilling Co.*, 207 Mo. 480, 105 S. W. 1057; *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329; *Nolan v. Brooklyn Heights R. Co.*, 68 App. Div. 219, 74 N. Y. Supp. 120; *Western Steel Car & Foundry Co. v. Cunningham*, 158 Ala. 369, 377, 48 So. 109. The Washington court, while admitting that the doctrine of *res ipsa loquitur*, as held by the Federal and other courts, is not ordinarily applicable to cases between master and servant, was not satisfied with the reasons given for the distinction, and held it applicable to a case of injury, stating that where the employee frees himself and his co-servants from fault and shows *prima facie* neglect of some one, the burden is thus cast on the master to free himself from fault. *La Bee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104.

440. *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537. Act Cong. July 7, 1838, making bursting of boiler on steamship *prima facie* evidence of negligence applies in favor of employees. *Fay v. Davidson*, 13 Minn. 523. Under the Ohio statute (sec. 3365-21) the burden of proof of want of knowledge of a defect in a car or locomotive or of due diligence to ascertain it, is upon the railroad company, the defect being shown and the injury therefrom. *Baltimore & Ohio R. Co. v. Burris*, 111 Fed. 882. But under such statute the burden of proving defendant's negligence nevertheless rests on plaintiff at all times. Proof of the defect merely raises a *prima facie* case. *Klunk v. Hocking Valley R. Co.*, 74 Ohio State 125, 77 N. E. 752. But Alabama statute placing burden on railroad company to show whistle was blown, etc., was held not applicable to suits by employees. The statute of Alabama providing that, when any person is injured by a locomotive or cars of a railroad, the burden of proof is on the railroad company to show that the engineer had blown the



constitutional.<sup>441</sup> So, in Florida and Georgia, at least until the amendment of the Georgia statute in 1909, a railroad employee suing for personal injuries, by statute, could throw the burden of showing the employer not negligent, on the employer, by proving plaintiff was free from fault.<sup>442</sup>

And under another statutory provision in Florida and Georgia, a presumption of negligence is raised against a railroad company when an employee is injured by the running of the locomotives or cars or other machinery.<sup>443</sup>

If the act complained of is in violation of a statute, it is sufficient for plaintiff to prove those facts alone which will bring the case within the statute.<sup>444</sup>

#### What must be proved.

Under this doctrine, a *prima facie* case of negligence is established by showing the injury,<sup>445</sup> or by so doing and

whistle at certain times and places, stopped the train for obstructions on the track, etc., does not apply to a case where an employee has been injured while engaged in his regular duty of removing cars, and the burden of proving that the company is guilty of negligence is on such employee. *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146.

441. See *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, where the provision of the Mississippi Code of 1906 (§ 1985) that in actions by passengers or employees of a railroad company for personal injuries, proof of injury inflicted by the "running of the locomotives or cars of such company" shall be *prima facie* evidence of negligence, is held not unconstitutional as taking property without due process of law or denying railroad companies the equal protection of the law. See also *Mobile,*

*J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, where the same statute was applied.

442. *Central R. & B. Co. v. Roach*, 64 Ga. 635.

443. *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 83; *Central of Ga. R. Co. v. Butler*, 8 Ga. App. 243, 68 S. E. 956. Hammer held not "machinery" within statute. *Georgia R. & B. Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049. By force of the Florida statute, ch. 4071, Acts 1891, a presumption of negligence may arise from the fact of an accident in the case of railroads, but the statute has no application to employees of other corporations and the common law does not authorize such presumption. *Green v. Sansom*, 41 Fla. 94, 25 So. 332.

444. See *Delaski v. Northwestern Improvement Co.*, 112 Pac. (Wash). 341.

445. See *infra*, illustrative cases.

eliminating negligence on the part of the servant and his fellow-servants for whose neglect the master is not responsible.<sup>446</sup>

#### **Evidence to rebut presumption.**

There is a class of cases holding that even where the facts are such as to create a presumption of negligence, yet it is completely overcome, as matter of law, by merely proving by competent experts that the machine or thing at the time was not defective or out of repair or that the conditions were such as to preclude negligence.<sup>447</sup>

In case of accident to an employee, even where the conditions are so obviously dangerous as to give rise to an inference of negligence, the master has not the burden of satisfactorily accounting for the accident, but merely of showing due care.<sup>448</sup>

#### **Automatic starting of machine.**

In some cases it has been held that the automatic starting of a machine, without any apparent cause, raises a presumption of a defect or of negligence.<sup>449</sup>

446. *LaBee v. Sultan Logging Co.*, 51 Wash. 81.

447. *Vorbrich v. Gender & Paeschke Mfg. Co.*, 96 Wis. 277, 71 N. W. 434.

448. *Spees v. Boggs*, 198 Pa. St. 112, 47 Atl. 875, 52 L. R. A. 933.

449. A printing press, after having been brought to a stop, suddenly started, injuring the operator, without any well explained cause. The court charged that if the press started of its own accord after it had been properly stopped, this fact unexplained was some evidence of negligence on the part of the defendant, but immediately afterwards added: "If you find that the shipper was pushed back to its extreme limit in its proper way, then the fact that it started up is in itself some evidence of a

defect somewhere, that is to say, of the existence of a defect about the machine, and some evidence of negligence on the part of the defendant or its superintendent, in allowing that defect to exist." The court say: "Taking the portions of the charge above cited, together, it is obvious that the judge went no farther than this court had already gone in" cases cited. *Cryne v. Boston Wooven Hose & Rubber Co.*, 191 Mass. 40, 77 N. E. 696. A printing press was automatically started. It had never done so before. It did not do so afterwards. No defect was shown. Because, however, the machine was second hand, had been used ten years, and there was some evidence that a belt might have become worn (not that it was worn) and this might

So it was held *prima facie* evidence of negligence chargeable either to the master or a fellow-servant, as the case may be, that an engine breaks through a closed door of a machine shop, injuring a workman.<sup>450</sup>

cause it to slip from a loose to a right pulley, a finding of the jury of negligence on the part of the master was sustained. It did not appear inspection would have revealed any defect, but rather the contrary. *Mulvaney v. Peck*, 196 Mass. 95, 81 N. E. 874. The unexplained automatic starting of a machine when it ought to remain at rest, is evidence of a defect (not evidence of negligence), and may, in connection with other evidence, establish negligence on the part of the master, as where he was chargeable with notice that there was some defect, and hence the question of the master's negligence became a question for the jury. A loom started automatically when at rest, and there was slight evidence that in replacing an old worn shaft with a new one, which had not at all times worked well, the adjustment of the new shaft to the old loom was made in such a manner that it might have been foreseen by one familiar with the mechanism that the belt was liable to work from the loose to the tight pulley. *Ryan v. Fall River Iron Works Co.*, 200 Mass. 188, 86 N. E. 310. It will be observed that the foregoing cases determined by the Massachusetts court are to the effect that the accidents referred to, were some evidence of defect, and not that the court determined that the happening of the accident was negligence chargeable to the master. The same court held that

the mere starting of a car while the conductor was standing on the fender adjusting the trolley, the cause not being shown, was insufficient to establish *prima facie* negligence of the master. *Curtin v. Boston Elevated R. Co.*, 194 Mass. 260, 80 N. E. 522. Where an engine left a side track with no one upon it, suddenly started, the cause not being ascertained, there being some evidence that the throttle was worn, the question of the company's negligence was held to be for the jury. *Maryland D. & V. R. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005. A finding that the superintendent whose duty it was to make necessary repairs of machines in a thread factory, was negligent in not repairing or improperly repairing a winding machine, was authorized from the fact that after it had been stopped with the lever, it started of itself after he said he had repaired it on notice that it was so acting. *Gregory v. American Thread Co.*, 187 Mass. 239, 72 N. E. 962. The automatic creeping of a driving belt on a carding machine from one pulley to another so as to start the machine, affords sufficient evidence that the machine is out of order and the master has been negligent in failing to inspect the same. *Petraca v. Quidneck Mfg. Co.*, 27 R. I. 265, 61 Atl. 648.

450. *Totten v. Pennsylvania R. Co.*, 11 Fed. 564.

In Texas, the mere fact that a machine, when at rest, started automatically was held sufficient to establish negligence of the master, it not appearing at the trial what, if any, defect existed which caused the machine to move.<sup>451</sup>

But where an employee was injured while removing waste from under a machine by the machine suddenly starting, the belt slipping from the loose pulley to the tight pulley, and no person was able to point with certainty to the cause of the transfer of the belt from the loose pulley to the tight pulley, if in fact it was so transferred, and no special defect in the situation or construction of the machine was pointed out, it was held that, because the machine started on this and three other occasions, the jury had no right to infer that there existed a defect of some kind which the defendant was negligent in not providing against, and a nonsuit was therefore proper.<sup>452</sup>

So where the die of a stamp press came down without pressure upon a lever which controlled it, there being no evidence as to any particular defect which caused it, it was held that an operator injured thereby could not recover of the employer on the ground of failure of duty on the part of the latter.<sup>453</sup>

#### Collision between trains.

The fact of a collision between trains has been held evidence of negligence.<sup>454</sup>

451. *Gulf, C. & S. F. R. Co. v. Hayden*, 29 Tex. Civ. App. 280, 68 S. W. 530.

452. *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35.

453. *Sargee v. Clark Can Co.*, 126 Mich. 508, 85 N. W. 1105.

454. See *Illinois Cent. R. Co. v. Vaughn*, 33 Ky. L. Rep. 906, 111 S. W. 707; *Jarnnssi v. Missouri Pac. R. Co.*, 155 Fed. 654 (where employees responsible therefor all vice-principals, by statute); *Choctaw, O. & G. R. Co. v. Doughty*,

77 Ark. 1, 91 S. W. 768; *Pittsburgh, C. C. & St. L. R. Co. v. Campbell*, 116 Ill. App. 356; *Shuler v. Omaha, K. C. & E. R. Co.*, 87 Mo. App. 618; *Stewart v. Raleigh & A. Air Line R. Co.*, 141 N. C. 253, 53 S. E. 877. Where a motorman, while on the platform of his car, was killed by his car colliding with a car ahead of his car, standing on the track, not lighted at the time, the platform of his car being crushed, it was held that from the evidence the jury might find that

On the other hand, it has been held that evidence merely showing a collision is not sufficient to prove negligence of the engineer in charge of the colliding train;<sup>455</sup> and that the mere fact of a collision of trains does not establish a presumption of negligence on the part of the railroad company in favor of its employees, such a presumption existing only in favor of passengers.<sup>456</sup>

**Derailment of engine or train.**

It was held that the mere fact of derailment of an engine, in the absence of explanation, raises a presumption of negligence against the company.<sup>457</sup>

So where a train became derailed by the sliding out of a newly made embankment, the fact that the embankment thus moved was held presumptive evidence that it was not properly constructed or completed for use.<sup>458</sup>

And in North Carolina it was held that a collision or derailment of a train causing injury to an employee, raises a presumption of negligence on the part of the railroad company, and casts on it the burden of proving that it was not negligent, notwithstanding the injury might have been caused by the negligence of a fellow-servant.<sup>459</sup>

the platform was old and rotten and the master had failed in its duty of inspection and repair. Witnesses testified that they examined the platform after the accident and found the wood to be decayed. *Hegman v. Jersey City H. & P. St. R. Co.*, 77 N. J. L. 310, 71 Atl. 1123. Where four cars released in some manner not appearing, collided with a tender, injuring an employee thereon, which is the ordinary course of things would not happen if those in charge of them had used due care, it raises an inference of negligence, though the brakeman's testimony was to the effect that he set the brakes. *Olson v. Great Northern R. Co.*, 68 Minn. 155, 71 N. W. 5.

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455. *Alabama Great Southern R. Co. v. Brock*, 161 Ala. 351, 49 So. 452.

456. *Smith v. Missouri Pac. R. Co.*, 113 Mo. 70, 20 S. W. 896. See also *Southern Ind. R. Co. v. Baker*, 37 Ind. App. 405, 77 N. E. 64.

457. *Galveston, H. & S. A. R. Co. v. Worth*, 53 Tex. Civ. App. 351, 116 S. W. 365.

458. *Farmers Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co.*, 67 Fed. 73.

459. *Wright v. Southern Ry. Co.*, 127 N. Car. 225, 37 S. E. 221; *Marconi v. R. Co.*, 126 N. C. 200, 35 S. E. 423. See also *Hemphill v. Buck Creek Lumber Co.*, 141 N. C. 487, 54 S. E. 420.

But where there was no direct evidence that a rail of a track was displaced by or the result of the acts of the section men, and there was evidence to the contrary, and the reasonable inference from the conditions as found upon examination after the accident, was that the displacing of the rail was the malicious act of a stranger, a direction of a verdict for defendant in an action by an employee to recover for injuries by the derailment of a train at such place, was proper.<sup>460</sup>

So it has been held that testimony that there was a defect in the track and that an injury occurred, is not enough to warrant a recovery. It is necessary to prove that the company knew of the defect or that it was of such a nature and had existed for such a length of time that in the exercise of ordinary care it should have been discovered by the company.<sup>461</sup>

And the federal courts hold that the mere fact of the derailment of a train is not sufficient evidence of negligence on the part of a railroad company or its employees.<sup>462</sup>

#### **Injuries caused by falls or breaks.**

A very common class of cases in which the doctrine of *res ipsa loquitur* is sought to be applied are those where an appliance breaks and causes the injury, or where something falls and injures a servant, whether caused by a break or otherwise. As to these cases, it seems impossible to lay down any rule in addition to the general rules already stated, and it is impossible to reconcile them.

Under this doctrine, it is held in some courts that if a master furnishes his servant with an instrument with which to do his work and directs him to do it in a particular manner, and while so doing it breaks, the burden is on the master to show that the instrument was suitable for the purposes for which it was intended, and that any

460. *Cotter v. Alabama G. S. R. Co.*, 61 Fed. 747.      v. *Tindall*, 57 Kan. 719, 48 Pac. 12.

461. *Atchison, T. & S. F. R. Co.*      462. *Chicago & N. W. R. Co. v. O'Brien*, 132 Fed. 593.

defect therein was unknown to the master, and by reasonable diligence could not have been discovered by him.<sup>463</sup>

In other jurisdictions, the mere breaking of an instrumentality furnished by the master is not of itself sufficient to shift the burden of evidence on to defendant.<sup>464</sup>

The rule of *res ipsa* has been applied in some cases where the cause of injury was the breaking of an appliance,<sup>465</sup> while in other cases it was held that no inference of negligence arose.<sup>466</sup>

463. *Labee v. Sultan Logging Co.*, 51 Wash. 81.

464. *Green v. Sansom*, 41 Fla. 94, 25 So. 332.

465. The mere fact that part of a machine broke, while plaintiff was operating it in a reasonable way and for the use for which it was intended, is evidence that the machine was defective. *Hannon v. American Steel & Wire Co.*, 193 Mass. 127, 78 N. E. 749. And it was stated in another case that if an implement, the breaking of which is attended with danger, breaks, in the proper use of it for the purpose for which it was designed, this "is some evidence" that the implement was defective in the sense that it was not safe or suitable for the use to which it was put. "Its use in its unsafe condition may or may not be due to the negligence of its owner." *Coleman v. Mechanic's Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065. That a team ran away with the wagon pole attached, which had become broken, there being some evidence tending to prove that the breaking of the pole was caused by imperfect welding of the iron by which the pole was attached to the wagon, that the work was done by defendant's servants

in its blacksmith shop, was held sufficient to establish *prima facie* negligence. *Gorman v. Hand Brewing Co.*, 28 R. I. 180, 66 Atl. 209. The fact that a band for rigging the hoisting boom to the mast of a vessel was made of old wire rope and broke when under less than one-tenth of the strain it was designed to stand, was sufficient evidence of its defective condition and to charge the ship with liability. *Neptune Steam Nav. Co. v. Borkman*, 118 Fed. 420.

**BRAKE CHAIN BREAKING.** It appearing that a brakeman was thrown from a car while setting a brake, by the breaking of the chain, a *prima facie* case of negligence was thereby established against the company. *Galveston H. & S. A. R. Co. v. Harris*, 48 Tex. Civ. App. 434, 107 S. W. 108.

**CHAIN BREAKING.** The breaking of a chain, a part of the tackle of a vessel, while unloading a bed plate weighing twelve tons, was presumptive evidence of negligence in furnishing a defective appliance. *The Schooner Robert Lewers Co. v. Kekanaha*, 114 Fed. 849.

**PLATFORM IN MINE FALLING.** The fact that a stull or platform across a narrow fissure in a mine fell and timbers thereof were found broken,



The fact that a rope which was being used broke was held to be *prima facie* evidence of negligence on the part of the employer. Yet an instruction that the burden shifted

was sufficient to send the question of the duty of the master in respect to its construction to the jury. There was a dissent by one of the judges. *Westland v. Gold Coin Mines Co.*, 101 Fed. 59.

**PULLEY BREAKING.** Where a wooden pulley, constructed by the defendant, broke, the pieces flying in different directions, and death resulted to an employee, and there was evidence tending to show it was properly constructed, and there was no evidence that such pulleys were used by others, it was a question for the jury whether the master had failed in its duty in using it. *Wabash Screen Door Co. v. Black*, 26 Fed. 721.

**ENGINE, FOOTBOARD ON GIVING WAY.** Where an employee of a railroad company, who was injured by falling from the footboard of an engine, testified that the board gave way under him, and after the accident the board was found to be broken, it was held that it was a question for the jury to determine whether the board was unsound or insecurely fastened, or was broken by the plaintiff's fall. It was said: From the mere fact that the footboard gave way under him, as he testified, and presumedly the jury found it did, the natural if not necessary inference would be, either that the board had become unsound or was insecurely fastened; and the inference that it had become unsound is supported by the evidence offer-

ed by the condition of the board after the accident. That condition, it is true, might be accounted for by the supposition of the defendant that the board was split by reason of its contact with plaintiff after his fall, but that would be inconsistent with the plaintiff's testimony that his fall was caused by the board giving way. Between the conflicting theories of the accident it was the province of the jury to decide, though it could only be done by inference. *Atchison, T. & S. F. R. Co. v. Mulligan*, 67 Fed. 569.

**FLANGE ON ENGINE TRUCK WHEEL BREAKING.** The flange on the wheel of an engine truck broke and the train was derailed. The wheel was of cast iron with chilled tires and somewhat worn. There was some evidence that such was not safe material. It was held that the question whether they were of safe material and had been properly inspected was for the jury. It was said that a presumption necessarily arises from the fact that the flange broke that the wheel was defective for the use to which it was put. *Texas & P. R. Co. v. Wimland*, 102 Fed. 673.

**HANDLE TO ASH BAG ON VESSEL, BREAKING.** An ash bag used upon a vessel fell, injuring a servant in the hold. The mere fact that the handle broke was evidence that it was weak and defective and sufficient to overcome the general testimony in the case to the effect that



upon the defendant, to show by a clear preponderance that he used proper diligence to ascertain defects in the rope, was held improper. The jury should have been

the bag was sound. *McDowell v. The France*, 53 Fed. 843.

**LADDER ROUND, BREAKING.** It was stated: "The accident having occurred from defective appliances, the defendant must show that in the selection and operation of the machinery which caused or contributed to the accident, it used due care, prudence, skill and watchfulness." This was said where a conductor was injured by the breaking of a round in a ladder upon a car, no proof having been offered as to knowledge on the part of the company of the defect or the length of time it had existed, or that it was patent. *Goodman v. R. & D.R. Co.*, 81 Va. 576. Contra, see *Patton v. Illinois Cent. R. Co.*, 179 Fed. 530; *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113, 61 N. E. 812.

466. *Green v. Southern R. Co.*, 72 S. C. 398, 52 S. E. 45; *Brooks v. Louisville & N. R. Co.*, 24 Ky. L. Rep. 1318, 71 S. W. 507. Where a brake chain parted, or something gave out, so that the brake wheel suddenly turned with a brakeman and threw him from the car. An inference of negligence did not arise. *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62. The mere fact of the breaking of a cable used in hoisting and lowering a car upon an incline, is not of itself sufficient evidence that it was not fit for the use intended, nor of negligence on the part of the master. *Hennig*

*v. Globe Foundry Co.*, 112 Mich. 616, 71 N. W. 156. So as to a pulley. *Duntley v. Inman, Poulsen & Co.*, 42 Oreg. 234, 70 Pac. 529, 59 L. R. A. 785. So where handle bar on hand car broke. *Howard v. Missouri Pac. R. Co.*, 173 Mo. 524, 73 S. W. 467. The general rule as to proof of the accident not being proof of negligence was applied where a car wheel broke from some cause unknown, the track being in good order and free from defects. *Morrison v. Phillips & Colby Const. Co.*, 44 Wis. 405. Where a servant was injured by the breaking of a chain used in raising a wrecked and derailed car, it was said: The mere fact of the breaking of the chain is not sufficient to authorize the inference or presumption that the master had failed to exercise reasonable care in its selection. *Brymer v. Southern Pacific R. Co.*, 90 Cal. 496, 27 Pac. 371. See *Morton v. Railway Co.*, 81 Mich. 423, 46 N. W. 111. Where an employee was injured on account of the breaking and falling of a clamp, to which was attached the guy rope of a derrick, there being no proof that the clamp was made of defective iron, or that it was defectively made, or not properly maintained, and no proof as to the cause of its breaking, no inference of negligence on the part of the master was properly permissible. *Welsh v. Cornell*, 168 N. Y. 508, 61 N. E. 891.

told that it was incumbent upon the defendant to explain.<sup>467</sup>

Where the cause of an accident was the falling of some object, the doctrine of *res ipsa* has been applied in some cases,<sup>468</sup> while in other cases the mere evidence of the

467. *Puget Sound Iron Co. v. Lawrence*, 3 Wash. Ter. 226, 14 Pac. 869.

468. Where an employee was killed while opening a car door by a bale of cotton falling upon him, it was held by a divided court that the maxim *res ipsa loquitur* applied. *Chamberlain v. Southern R. Co.*, 159 Ala. 171, 48 So. 703. Applied to fall of brick arch (*Chenall v. Palmer Brick Co.*, 119 Ga. 837, 47 S. E. 329); fall of barrel from platform (*Armour v. Golowska*, 95 Ill. App. 492); fall of drum or post used in repairing boom (*Sackewitz v. American Biscuit Mfg. Co.*, 78 Mo. App. 144); fall of crowbar (*Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588, 78 S. W. 275). The fall of the walls of a coal shed, about a month subsequent to its erection, was held sufficient to warrant a jury in finding not only that it was improperly constructed, but that the master was chargeable with knowledge thereof. *Schmidt v. J. G. Johnson Co.*, 145 Wis. 49, 129 N. W. 657.

**BOLT FALLING OUT OF APPLIANCE.** Where a split key used to hold a buffer iron to a bolt, came out, permitting the buffer to fall on an employee, it was held that the fall of the buffer was evidence of negligence. *Sullivan v. Rowe*, 194 Mass. 500, 80 N. E. 459. Where a person not an employee was injured while passing along a street

under the defendant's elevated railroad structure by a portion of a broken bolt to which was attached an iron plate falling from such structure upon him, and defendant proved that its road had been properly constructed, and by its track walker and inspector, whose duty it was to examine all bolts and fastenings and keep them tight, that he followed instructions to the best of his ability, and did not discover the defect, and plaintiff's counsel asked to have defendant's negligence submitted to the jury on the ground that the fact that the bolt fell was presumptive evidence that the defendant was negligent, which request was denied and a verdict directed for the defendant, it was held error; that the fact that the bolt was broken and part of it fell was sufficient to raise a presumption that, in that particular, defendant's structure was out of repair and dangerous; that the evidence of the inspector was not sufficient to remove such presumption. *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 31 N. E. 870.

**CISTERN WALL FALLING.** It was said in reference to a cistern wall in process of construction which fell, injuring a laborer engaged in throwing gravel behind it, the fact that the wall fell by its own weight or by the pressure of gravel and earth behind it, placed there by the defendant, raised a presump-

tion of negligence. If it had been properly constructed, it is common observation and within the common course of things, that it would not have fallen, therefore it was not properly constructed; and it was negligently constructed because by the exercise of ordinary care and prudence such well would have been so constructed that it would not have fallen, but would have stood alone. *Mulcairns Admx. v. City of Janesville*, 67 Wis. 24, 29 N. W. 565.

**COAL FALLING FROM TENDER.** Proof that a piece of coal flew from the tender of a passing train, injuring a section hand, standing a reasonable distance from the track, in the absence of explanation, under the doctrine of *res ipsa loquitur*, constitutes sufficient negligence of the company to establish a *prima facie* case, notwithstanding the evidence was to the effect that the coal was properly loaded on the tender. *Gulf, C. & S. F. R. Co. v. Wood*, 63 S. W. (Tex. Civ. App.) 164. Contra, see *Anderson v. Union Pac. D. & G. R. Co.*, 8 Colo. App. 521, 46 Pac. 480.

**DUMB WAITER FALLING.** Negligence of the master was established by evidence that a dumb waiter fell without any weight upon it, that one of the strands of the rope which supported it had frayed out, in connection with the fact that the injured party was not allowed to see the rope after the accident, and defendant did not produce it in court. *Winkelman & Brown Drug Co. v. Calladay*, 88 Md. 78, 40 Atl. 1078.

**EMPLOYEE FOUND UNCONSCIOUS.** Where an employee was found un-

conscious upon the floor and a fallen shaft and pulley was close beside him, such shaft having been in process of repair, it was sufficient, in the absence of any direct evidence as to the cause of the injury, to establish that his injuries were caused by the shaft and pulley falling upon him. *Norfolk Beet Sugar Co. v. Burnett*, 55 Neb. 400, 75 N. W. 839.

**LUMBER PILE FALLING.** The doctrine of *res ipsa loquitur* was applied where an employee was injured while, in obedience to the direction of a vice-principal, he went to the place where injured by the falling upon him of a pile of lumber insecurely piled, the vice-principal having directed the manner in which the lumber was piled. *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.

**ROOF FALLING.** Where an employee was killed by the falling of a roof while being raised, and there was no evidence of his negligence nor of the cause of the falling of the roof, it was held that the fact that the roof fell was sufficient evidence of defendant's negligence in executing the work to carry the case to the jury. It was said: In this case the falling of the roof was in and of itself some evidence that the work was not being done with ordinary care and skill. It is true that the mere fact of an injury does not impute negligence on the part of any one, but where a thing happens which ordinarily would not have occurred if due care had been used, the fact of such happening raises a presumption of negligence in some one. *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989.

accident was held insufficient to make out a *prima facie* case.<sup>469</sup>

Thus, the fall of an elevator has been held not *prima facie* evidence of negligence.<sup>470</sup>

**RACK FALLING.** The fact that a rack in a factory constructed for the storage of lumber, fell when only half full, afforded evidence of the insufficiency of the rack. *Corbett v. American Screen Door Co.*, 133 Mich. 669, 95 N. W. 737.

**TIMBER FALLING, PART OF BUILDING.** From the mere fall of a timber constituting a part of a building or structure, provided as a place in which employees are to work, arises a reasonable inference that the owner and employer has failed in his duty either to make it safe or to exercise reasonable diligence and care to keep it safe. *Lipsky v. C. Reiss Coal Co.*, 136 Wis. 307, 117 N. W. 803.

469. Where an employee was injured by the fall of a dirt plow from a car, and under the charge of the court the jury were permitted to find from the fact that the accident occurred, without any evidence of negligent or unskilful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of the defendant, it was held that this was error. *De Vauw v. Penn. & N. Y. C. & R. Co.*, 130 N. Y. 632, 28 N. E. 532. The mere fact that a car while being unloaded fell from an elevated tramway, is not proof of negligence in not placing guards along the sides of the track, nor is the fact that guards were subsequently so placed evidence of prior negligence. *Barber Asphalt*

*Pav. Co. v. Odasz*, 60 Fed. 71. The doctrine of *res ipsa loquitur* held not applicable to establish defect in the construction of a window, or keeping it in repair, from the mere fact that the broken glass fell therefrom. *Stewart & Co. v. Harman*, 108 Md. 446, 70 Atl. 333, where it is stated that a different rule would apply if whole pane had fallen out, unbroken. It was said mere proof that an accident had happened is not evidence of a master's negligence. The master is not an insurer and is only liable for the exercise of reasonable care and prudence. This rule applied where a servant was killed by the fall of an iron shutter of a vessel. *Rende v. N. Y. & Texas S. S. Co.*, 187 N. Y. 382, 80 N. E. 206.

470. *Klebe v. Parker Distilling Co.*, 207 Mo. 480, 105 S. W. 1057, where rule of *res ipsa* is discussed at length; *Stackpole v. Wray*, 99 App. Div. 262, 90 N. Y. Supp. 1045; *Starer v. Stern*, 100 App. Div. 393, 91 N. Y. Supp. 821; *Womble v. Merchants' Grocery Co.*, 135 N. C. 474, 47 S. E. 493. But see *Samuels v. McKesson*, 113 App. Div. 497, 99 N. Y. Supp. 294. Where the evidence did not show what caused an elevator to fall, the master was not liable for injuries sustained by an employee caused by its falling. Yet it was held evidence was proper to show that the appliance had previously shown symptoms of in-

The fall of a scaffold has been held, under some circumstances, not *prima facie* evidence of negligence,<sup>471</sup>

efficiency or dangerous irregularity in its operation. *Casterton v. American Blower Co.*, 142 Mich. 407, 106 N. W. 61. Where the fall of a freight elevator was caused by the breaking of a large cog wheel through the center, while carrying a heavy load, but not beyond its capacity, which would not result from mere use or wear, this of itself did not show negligence on the part of the master, under the doctrine of *res ipsa loquitur*. There being no proof of a defect or of being improperly maintained, an employee injured by such fall could not recover. *National Biscuit Co. v. Wilson*, 169 Ind. 442, 82 N. E. 916. See also *Scott v. Nauss Bros. Co.*, 126 N. Y. Supp. 17. Where a freight elevator upon which an employee was riding fell, causing him injury, and there was no evidence of defect in construction, other than an inference that might be drawn from the statement of an expert, that a different construction prevailed at the time of the accident, there being no evidence that the construction was dangerous in any respect or that the elevator was unsafe, negligence of the master did not appear. *Young v. Mason Stable Co.*, 193 N. Y. 188, 86 N. E. 15, 127 Am. St. Rep. 939, 21 L. R. A. 592, n. s. Where an elevator fell, and it appeared after the accident that one of the balance ropes had become detached, the eye having slipped off the hook, and the weight attached to the opposite end, had fallen to the cellar, and it was also found that

the key or pin which held the wheel on the axle above, had come out, it was said: The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery so constructed often gives way from some unknown cause or hidden defect. The fact that once before it had descended in a manner similar to that in the present case is not evidence that it was out of repair, as in that case the accident may have resulted from a failure to set and lock the brake. *Robinson v. Wright & Co.*, 94 Mich. 283. The fact that an elevator gate fell by reason of its failing to catch upon the hook, provided for that purpose, there being no evidence as to what was the cause, nor but what the appliance was in perfect order before and after the accident, was not sufficient to sustain an allegation of negligence of the master, in not keeping its ways, works and machinery in order, as required by the statute. *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75, 74 N. E. 303.

471. *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805; *Bergman v. Altman*, 127 Ia. 693, 104 N. W. 280; *Pellerin v. International Paper Co.*, 96 Me. 388, 52 Atl. 842. Where a staging fell by reason of the lookouts breaking, and there being no evidence to the effect that it was built of improper materials or was improper in construction, negli-

while in other cases the mere falling has been held to raise a presumption of negligence.<sup>472</sup>

### Explosions.

Evidence of an explosion has, in some cases, been held of itself to constitute a prima facie case of negligence,<sup>473</sup> but in most cases the contrary has been held.<sup>474</sup>

gence of the master was not shown. *Bergman v. Altman*, 127 Ia. 693, 104 N. W. 280.

472. Where a scaffold provided by the master for a servant's use, falls, and no other cause of the fall is ascertained except as inferred from the fall itself, the fall is prima facie evidence of the negligence of the master in an action by the servant to recover damages, received in consequence thereof. Where the cause of the fall is otherwise ascertained, secs. 18 and 19 of the Labor Law (Laws 1897, ch. 415) enlarge the duty of the master, and extend it to responsibility for the safety of the scaffold itself, and thus the want of care in the details of its construction. *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Solarz v. Manhattan R. Co.*, 155 N. Y. 645, 49 N. E. 1104; *Green v. Banta*, 97 N. Y. 627. The doctrine of *res ipsa loquitur* was applied to the fall of a scaffold, furnished as a completed appliance. *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888.

473. It was held that the fact of an explosion of a steam tank raised a presumption of negligence which the defendant was required to negative. *Allerton Packing Co. v. Egan*, 86 Ill. 253. But a gasoline explosion on a sleeping car in which plaintiff and a fellow-servant were

cleaning carpets does not raise a presumption of negligence. *Waedanz v. Chicago, B. & Q. R. Co.*, 151 Ill. App. 198.

474. *Texas & Pac. R. Co. v. Barrett*, 166 U. S. 617; *G. A. Duerler Mfg. Co. v. Dullnig*, 83 S. W. (Tex. Civ. App.) 889; *Omaha Packing Co. v. Murray*, 112 Ill. App. 233. The mere fact that a steam drum exploded is not sufficient evidence of negligence. An employee injured must further show a failure of duty on the part of the master to exercise reasonable care to make and keep the drum in safe condition. Leakage in such drum having been discovered a short time previous to the explosion, and no examination having been made to discover its cause, the inference was indulged that the bursting of the drum was attributable to its having become weakened from some cause, which there was some evidence tending to show might have been the cause of the leakage, and hence the master had failed in the duty of making proper inspection. In *re California Nav. & Imp. Co.*, 110 Fed. 670. The cause of an explosion of a steam oven, not being shown, and the inference being as consistent with want of care on the part of the engineer who was injured, as of a defect, none being found, it was held there was no ground for

Thus, it has been held that the explosion of a boiler in a steamboat, injuring an employee, is presumptively caused by negligence on the part of the employer.<sup>475</sup>

On the other hand, it has been that the mere fact of the explosion of a steam boiler does not raise a *prima facie* presumption of negligence on the part of the master.<sup>476</sup>

The doctrine of *res ipsa* has been held inapplicable where the controller on a street car exploded.<sup>477</sup>

It being a fact that nitroglycerine exploded spontaneously, and there was evidence which tended to show that where properly made and pure it will not thus explode, but might in case it was impure, it was a question for the jury if such was a fact, and if so a presumption that the explosion arose from impurity followed.<sup>478</sup>

But where it has been shown that a co-employee of plaintiff was in the habit of permitting gasoline to drip from the burner of his machine after it had been extinguished, and that enough gas had been formed in the room in that way to account for an explosion, there could be no presumption from the fact of the explosion that there was any defect in the apparatus supplying the gasoline.<sup>479</sup>

#### Train breaking apart.

The fact that a freight train broke apart when it ought not to, is some evidence of negligence for which a

recovery against the master. *Cummings v. Master & Wardens of Grand Lodge of Masons*, 195 Mass. 348, 81 N. E. 189. An explosion having occurred in a machine used in manufacturing fire works, no defect therein or cause being shown, the doctrine of *res ipsa loquitur* was held not applicable. *Thompson v. National Fireworks Co.*, 195 Mass. 327, 81 N. E. 256.

475. *Powey v. Schoville*, 10 Fed. 140. The explosion of a steam boiler, whether in control of the owner, his employees, or chartered to others, is presumptive

evidence of its unsafe condition or that it was not properly managed. *Rose v. Stephens & Condit Trans. Co.*, 11 Fed. 438.

476. *Huff v. Sustin*, 46 Ohio St. 386, 21 N. E. 864; *Toledo, W. & W. R. Co. v. Moore, Admx.*, 77 Ill. 217.

477. *Beebe v. St. Louis Transit Co.*, 206 Mo. 419, 103 S. W. 1019.

478. *Bradford Glycerine Co. v. Kizer*, 113 Fed. 894.

479. *Murbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36.



railroad company would be liable in a suit brought by one not an employee, but if nothing more appears it does not indicate negligence for which it is liable to one of its employees.<sup>480</sup>

#### **Wreck of train.**

There is no presumption of negligence on the part of a railroad company from the fact that a wreck has occurred and an employee was injured.<sup>481</sup>

#### **Cave in.**

The mere fact of the caving in of a mine raises no presumption of negligence. The burden is still upon the plaintiff to show failure of duty on the part of the master.<sup>482</sup>

#### **Box on hand car striking platform.**

The fact that a box placed on a hand car by order of the foreman, and on which he is standing to hold it on, struck a station platform as the car was passing, throwing and injuring one of the employees, of itself makes out a prima facie case of negligence, which it devolves upon the defendant to meet.<sup>483</sup>

480. *Young v. Boston & Maine R. Co.*, 168 Mass. 219, 46 N. E. 624. But see, in same state, apparently to the contrary so far as the breaking of an appliance is concerned, *Hannon v. American Steel & Wire Co.*, 193 Mass. 127, 78 N. E. 749; *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065. Where a train pulled apart, there being no direct evidence that the key holding the steam was defective, but there was evidence that if it had not been defective it could not have pulled out, and also evidence that about a month afterwards a key was found near where the break occurred, but the fastening which

should have been attached to it was not found, and evidence also that the car and drawhead had been inspected, it was held sufficient to sustain a finding that the company was negligent in failing to provide a safe key. *Missouri, K. & T. R. Co. v. Cox*, 55 S. W. (Tex. Civ. App.) 354.

481. *St. Louis & S. F. R. Co. v. Hill*, 79 Ark. 76, 94 S. W. 914.

482. *Mountain Copper Co. v. Van Buren*, 123 Fed. 61; *City of Greeley v. Foster*, 32 Colo. 292, 299.

483. *Louisville & N. R. Co. v. Northington*, 91 Tenn. 56, 17 S. W. 880.



**Shock received by operator of telephone exchange.**

Where an injury (shock) was received by an operator at a telephone exchange, and in an action brought therefor the company offered no explanation concerning the accident, which the jury could have found was of such a nature that it would not have occurred unless the company had permitted the apparatus to become defective, the company could not, in support of a verdict directed for it, maintain that the injury might have been caused by the negligence of fellow-servants, or of the failure of the chief operator or of the switch board inspector to perform their duty, or that a workman had carelessly repaired the apparatus. If the shock was caused either by the want of repair or of a proper adjustment of the different parts, the question of defendant's negligence was for the jury.<sup>484</sup>

484. *Cahill v. New England Tel. & Tel. Co.*, 190 Mass. 421, 79 N. E. 821.

## BOOK V.

### PROCEDURE.

#### Chapter

- I. TIME TO SUE, § 798.
- II. PARTIES, §§ 799–801.
- III. NOTICE BEFORE BRINGING SUIT, §§ 802–819.
- IV. PLEADING, §§ 820–856.

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#### CHAPTER I.

##### TIME TO SUE.

#### § 798. What law governs.

In determining whether the time to sue has elapsed, it is necessary to consult the general statutes of limitation in force in the state which fix the time to sue from one year in some states to six years in other states; and it is also necessary, if the right to recover is dependent on a statute, to observe if such statute itself fixes a time within which the suit must be brought, since if it does it determines the period of limitations in such a case rather than the general statute. For instance, in several of the states which have adopted Employers' Liability Acts the statute itself fixes the time to sue, so that if the action is one where the rule of fellow-servants would be a defense but for the statute, and the statute is relied on, the action must be brought within the time fixed by such statute which is generally less than the time within which an action based on a common law cause of action may be brought. Thus in Massachusetts and some other states, the time to sue is limited by the Employers' Liability Act to one year.

## CHAPTER II.

### PARTIES.

Sec. 799. In general.	Sec. 801. Who may sue where injured servant dies.
800. Joinder of master and negligent servant as defendants.	

#### § 799. In general.

The rules relating to proper and necessary parties in actions for personal injuries caused by negligence apply where the parties are employer and employee the same as if the action was by one having no contract relations with defendant. The action is one *ex delicto* notwithstanding the duty violated by the master is one imposed by the contract of employment.

#### § 800. Joinder of master and negligent servant as defendants.

The general rule is that where the negligence was that of another servant, plaintiff may join as defendants the employer and the negligent servant;<sup>1</sup> and it makes no difference that the liability of the master is imposed by statute while the liability of the negligent servant is imposed by common law.<sup>2</sup>

1. Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 81 N. E. 411; Southern R. Co. v. Grizzle, 124 Ga. 735; Coalgate Co. v. Bross, 25 Okla. 244, 107 Pac. 425; Morrison v. Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Alabama Great So. R. Co. v. Thompson, 200 U. S. 206; Charman v. Lake Erie & W. R. Co., 105

Fed. 449. Contra, see Parsons v. Winchell, 5 Cush. 592; Mulchey v. Religious Soc., 125 Mass. 487; Clark v. Fry, 8 Ohio St. 358, 377; Campbell v. Sugar Co., 62 Me. 553; Bailey v. Bussing, 37 Conn. 349; Page v. Parker, 40 N. H. 47, 68; Beuttel v. Railway Co., 26 Fed. 50.

2. Southern R. Co. v. Miller, 1 Ga. App. 616, 57 S. E. 1090.

There is no question, however, that where the negligent act complained of was, in fact or by legal intentment, the joint act of the employer and co-servant, they can be jointly sued.<sup>3</sup>

But it is not necessary to join them as defendants since it is proper to sue the employer alone or to sue the negligent servant alone. If the joinder is proper, plaintiff cannot be compelled to elect as to which defendant he shall proceed against.<sup>4</sup>

**§ 801. Who may sue where injured servant dies.**

If the injured servant dies, the general statute prevailing in probably every state and authorizing a recovery for death resulting from negligence, should be consulted, and also, in some states, the Employers' Liability Act which makes special provisions. Sometimes there may exist a choice between suing under the general death act and under the Employers' Liability Act, and in such case the fact that the damages are restricted in amount by one and not the other statute, or more restricted by one statute than the other, is to be considered.<sup>5</sup>

Under some statutes, such as the Massachusetts Employers' Liability Act, the person entitled to sue depends upon whether the injured servant was instantly killed or died without conscious suffering, or the reverse.<sup>6</sup>

Whether the action shall be brought by the personal representatives, widow, parents, heirs, or next of kin of the deceased, is to be determined by the law of the state where the action is brought.

3. *Galvin v. Brown & McCabe*, 53 Or. 598, 612, 101 Pac. 671.

4. *Coalgate Co. v. Bross*, 25 Okl. 244, 107 Pac. 425.

5. See *McMurray v. St. Louis, I. M. & S. R. Co.*, 225 Mo. 272, 125 S. W. 751.

6. See *supra* —.

## CHAPTER III.

## NOTICE BEFORE BRINGING SUIT.

Sec.		Sec.	
802. Necessity for.			Extension of time.
Contract provisions for notice.		808. Who may or must give notice.	
Where injured servant a minor.		809. Contents.	
Waiver.		Time.	
Estoppel to question failure to give notice.		Place.	
803. Purpose of statutes.		Cause of injury.	
804. What law governs.		810. Signature.	
805. Complaint as notice.		811. Construction.	
806. Necessity for writing.		812. Amendments.	
807. Time within which notice must be given.		813. On whom notice to be served.	
Service before action commenced.		814. Mode of service.	
When service by mail deemed complete.		815. Demand for further notice.	
		816. Effect of mistakes or defects in.	
		817. Effect of notice.	
		818. Raising objection on trial.	
		819. Federal courts follow state decisions.	

## § 802. Necessity for.

In Colorado, Kansas, Massachusetts, New York, and a few other states, the fellow-servant statute requires the service of a notice of the injury on the employer within a specified time after the injury. In Washington and Oregon, notice is required by the Factory Acts. In some other states, such as Wisconsin, a statute requires such a notice in all actions for personal injuries, without regard to whether the relation of master and servant exists.<sup>7</sup>

In such jurisdictions, in cases where the statute applies, the service of such notice is a condition precedent to the right to sue.<sup>8</sup>

7. See *Guile v. La Crosse Gas & E. Co.*, 145 Wis. 157, 130 N. W. 234.

8. *Healey v. Geo. F. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 3 M. & S.—13

270; *Finneran v. Graham*, 198 Mass. 385, 84 N. E. 473; *Grebenstein v. Stone & Webster Engineering Co.*, Mass., 95 N. E. 503; *Carlin v. New York Dock Co.*, 137

Notice of injury is not necessary, and is wholly ineffective if given, where the plaintiff does not rely on the Employers' Liability Act for a recovery but intends to sue under the common law rule,<sup>9</sup> and it follows that it is not necessary where he has a remedy both under the statute and under the common law but does not intend to rely

App. Div. 71, 122 N. Y. Supp. 57; *Grasso v. Holbrook, Cabot & Daly Cont. Co.*, 102 App. Div. 49, 92 N. Y. Supp. 101; *Pohlman v. Chicago, R. I. & P. R. Co.*, 182 Fed. 492 (construing Kansas statute); *Lange v. Union Pac. R. Co.*, 126 Fed. 338, 62 C. C. A. 48 (construing Colorado statutes); *Nelson v. Young-Cole Lumber Co.*, 58 Wash. 56, 107 Pac. 873 (immaterial that plaintiff is insane). Where there is no proof of such notice, a nonsuit is proper. *Stahl v. Schoonmaker*, 84 N. Y. Supp. 239. An employee failing to give his employer notice of the time, place and cause of injury as provided by the Employer's Liability Act, waives his right to sue therefor. *Cahill v. New England Tel. & Tel. Co.*, 190 Mass. 421, 79 N. E. 821.

9. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. 981, n. s. (construing Colorado statute); *Colorado Milling & Elevator Co.*, 26 Colo. 284, 58 Pac. 28 (action for death based on statute reiterating common law rule); *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. Supp. 49; *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 App. Div. 600, 88 N. Y.

Supp. 407. Notice of the injury is not necessary except where the action is one based on the fellow-servant statute as distinguished from an action based on the common law. *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411; *St. Louis & San Francisco R. Co. v. Little*, 75 Kan. 716, 90 Pac. 447. In New York, a notice of common-law negligence is not required, and is not a notice to bring the case within the enlarged liability imposed by the Legislature. Where there is no notice of any defect in the condition of the ways, works, or machinery, or of the negligence of any person exercising superintendence with the authority or consent of the employer, there is no notice where the employer is not a railroad company. *Simpson v. Foundation Co.*, N. Y., 95 N. E. 10. The notice, in order to be of any importance, must cover a liability under the Employers' Liability Act and not merely a common law liability. *Welch v. Waterbury Co.*, 136 App. Div. 315, 120 N. Y. Supp. 1059; *Ortolano v. Degnon Contracting Co.*, 120 App. Div. 595, 104 N. Y. Supp. 1064; *Chisholm v. Manhattan R. Co.*, 116 App. Div. 320, 101 N. Y. Supp. 622 (where complaint was substitute for notice).

on the statute,<sup>10</sup> unless notice is required by contract. No notice is necessary, in New York, where the action is brought under the general code section relating to recovery of damages for injuries from a wrongful act resulting in death;<sup>11</sup> nor where the action is based on the labor law relating to scaffolds, etc., and not on the Employers' Liability Act of 1902.<sup>12</sup>

So it has been held in New York that this statute does not apply to actions brought against a railroad company where the statute making certain employees vice-principals is relied on.<sup>13</sup>

In Kansas, such a statute has been held not applicable where the servant was killed and the action was by the administrator.<sup>14</sup>

It has been held that a statute requiring notice to a municipality of injuries caused by defects in streets does not apply where the relation of master and servant exists.<sup>15</sup>

#### Contract provisions for notice.

Some employers insert in their contracts of employment a provision requiring a specified notice of a claim for personal injuries. Such conditions may be waived by the employer and no consideration is required therefor.<sup>16</sup>

A provision in a contract between a railroad and an employee that, in consideration of employment, the employee agrees to give the railroad company notice of personal injuries sustained by him while in the service, within a specified number of days after receiving such injuries, and that his failure to give such notice in the manner and within the time specified shall be a bar to an

10. *Ryalls v. Mechanics' Mills*, *supra*.

11. *Holm v. Empire Hardware Co.*, 102 App. Div. 505, 92 N. Y. Supp. 914.

12. *Williams v. Roblin*, 94 App. Div. 177, 87 N. Y. Supp. 1006.

13. *Schradin v. New York, C. & H. R. R. Co.*, 103 N. Y. Supp. 73.

14. *Iarussi v. Missouri Pac. R. Co.*, 155 Fed. 654, construing Kansas statute; *Philes v. Missouri Pac. R. Co.*, 141 Mo. App. 561, 125 S. W. 553, construing Kansas statute.

15. *Pesek v. City of New Plague*, 97 Minn. 171, 106 N. W. 305.

16. *Missouri, K. & T. R. Co. v. Walker*, 79 Kan. 31, 99 Pac. 269.

action therefor, was held in violation of the statutory provision that no contracts which restrict liability shall be legal or binding.<sup>17</sup>

And by statute in Texas, fixing the time for giving notice at less than ninety days is void.<sup>18</sup>

**Where injured servant a minor.**

The statutes apply where the injured employee is a minor as well as where he is an adult.<sup>19</sup>

**Waiver.**

Service of any notice at all may be waived by the employer by his words or acts.<sup>20</sup>

**Estoppel to question failure to give notice.**

Where a statute requires notice to be given, and an injured servant is induced by the master or his representatives not to serve the notice within the statutory time, the master is estopped from invoking the bar of the statute.<sup>21</sup>

**§ 803. Purpose of statutes.**

The purpose of the notice required by the statute is to enable the employer to make a reasonable investigation of the accident, and then adjust or resist the claim as he deems advisable.<sup>22</sup>

17. *Munford v. Chicago R. J. & P. R. Co.*, 128 Ia. 685, 104 N. W. 1135; *Missouri, K. & T. R. Co. v. Hudgins*, (Tex. Civ. App.), 127 S. W. 1183.

18. *Chicago, R. I. & P. R. Co. v. Thompson*, 100 Tex. 185, 97 S. W. 459, holding validity of stipulation entered into in Indian Territory not governed by law of Texas where suit brought. Statute now applies only to employers other than railroad companies, the latter being absolutely prohibited from making any such contract.

19. *Hoffmann v. Milwaukee*

*Elec. R. & L. Co.*, 127 Wis. 76, 106 N. W. 808.

20. *Wolven v. Gabler*, 132 App. Div. 45, 116 N. Y. Supp. 359.

21. *Guile v. La Crosse Gas & E. Co.*, 145 Wis. 157, 130 N. W. 234. So where contract of employment requires notice, and master tells employee he will do what is right, and servant is induced to believe provision of contract waived. *Missouri, K. & T. R. Co. v. Hendricks*, 49 Tex. Civ. App. 314, 108 S. W. 745.

22. *Barry v. Derby Desk Co.*, 121 App. Div. 810, 106 N. Y. Supp. 575.



**§ 804. What law governs.**

The necessity for giving any notice at all is governed by the law of the state where the accident occurred, while the mode of service of the notice is governed by the law of the forum.<sup>23</sup>

**§ 805. Complaint as notice.**

The filing of a complaint has been held equivalent to the giving of the statutory notice,<sup>24</sup> and in some states, including Wisconsin, this rule has been reiterated by statute.

In New York, however, where service of the complaint is not equivalent to notice,<sup>25</sup> and the same is true in Massachusetts.<sup>26</sup>

**§ 806. Necessity for writing.**

The statutes expressly require that the notice shall be in writing. But it may be typewritten instead of written out in long hand.<sup>27</sup>

**§ 807. Time within which notice must be given.**

The statutes differ considerably as to the time for giving notice, varying from thirty days in Massachusetts to two years in Wisconsin.<sup>28</sup>

Under the New York statute, the notice must be given within one hundred and twenty days, but if from physical or mental incapacity it is impossible for the person injured to give notice within such time, he may give the same within ten days after such incapacity is removed. If he

23. *Husted v. Missouri Pac. R. Co.*, 143 Mo. App. 623, 128 S. W. 682. If no notice is given, statute of sister state cannot be relied on. *Pullman Co. v. Woodfolk*, 121 Ill. App. 321.

24. *Welsh v. Barber Asphalt Paving Co.*, 167 Fed. 465, construing Oregon statute. Filing of suit is equivalent to notice in Texas, *Missouri, K. & T. R. Co. v. Hawley*, 123 S. W. 726.

25. *Johnson v. Roach*, 83 App. Div. 151, 82 N. Y. Supp. 203.

26. See *infra*, time for notice, § 807.

27. *Hunt v. Dexter Sulphite Pulp & Paper Co.*, 100 App. Div. 119, 91 N. Y. Supp. 279.

28. In Wisconsin, it was formerly provided that the notice must be given within one year, but by amendment in 1909 the time is now extended to two years.

dies without giving such notice, his executor or administrator may give such notice within sixty days after his appointment.<sup>29</sup>

Under this statute, if the servant dies without having given notice, notice must be given, by the executor or administrator, it is held in one case, within sixty days after his appointment, although one hundred and twenty days from the time of the accident have not elapsed,<sup>30</sup> but the contrary is held in another case.<sup>31</sup>

The statute in Massachusetts is similar as to the excuse of incapacity,<sup>32</sup> and it is held thereunder that physical incapacity, where there is mental capacity, does not prolong the time.<sup>33</sup>

#### Service before action commenced.

The notice must be served before the action is commenced, although undoubtedly it may be served on the same day; but it is held that if both the service of the notice and the suing out of the writ occur on the same day, plaintiff must show that the former was done at an earlier hour than the latter.<sup>34</sup>

If notice of the time, place and cause of injury is not served until after the writ is sued out in an action for the injury, the action cannot be maintained,<sup>35</sup> although the

29. Where servant is insane, query as to whether guardian may give notice. *Nelson v. Young-Cole Lumber Co.*, 58 Wash. 56, 107 Pac. 873.

30. *Randall v. Holbrook, Cabot & Daly Contracting Co.*, 95 App. Div. 336, 88 N. Y. Supp. 681.

31. *Hoehn v. Lantz*, 94 App. Div. 14, 87 N. Y. Supp. 921.

32. Where an injured employee was in bed nearly two months after an injury, but most of the time he knew and conversed with people and a good deal of the time he was conscious, such condition was not sufficient to excuse the giving of the notice required by section 3 of

the Employers' Liability Act, within thirty days after the accident. *Ledwidge v. Hathaway*, 170 Mass. 348, 49 N. E. 656.

33. *Cogan v. Burnham*, 175 Mass. 391, 56 N. E. 585.

34. *Finneran v. Graham*, 198 Mass. 385, 84 N. E. 873.

35. *Veginan v. Morse*, 160 Mass. 143, 35 N. E. 451; *Finnerman v. Graham*, 198 Mass. 586, 84 N. E. 299; *Healy v. Geo. F. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 270. Notice is necessary although action is commenced within time required for service of notice. *Simerson v. St. Louis & S. F. R. Co.*, 173 Fed. 612, construing Kansas statute.

contrary is held in Texas, where the filing of the suit is held equivalent to such notice.<sup>36</sup>

**When service by mail deemed complete.**

The New York statute expressly provides that service by mail shall be deemed to be made when the letter containing the notice would be delivered in the ordinary course of the post.

**Extension of time.**

The time for service may be extended by the acts or words of the employer.<sup>37</sup>

**§ 808. Who may or must give notice.**

Where the statute makes no specific provision as to who shall serve the notice, it must be given by the injured servant or in his name, and if he dies and a notice is necessary it would seem to follow that the notice should be given by his personal representatives.

In Massachusetts, the notice required to be given, upon the instantaneous death of an employee, may be given by his widow,<sup>38</sup> or by his personal representatives.<sup>39</sup>

The notice cannot be given by a stranger, nor by the administrator of the injured servant before his appointment, and it follows that the attorney of the person after-

36. *Missouri, K. & T. R. Co. v. Hawley* (Tex. Civ. App.), 123 S. W. 726.

37. *Wolven v. Gabler*, 132 App. Div. 45, 116 N. Y. Supp. 359.

38. *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, 27 N. E. 179.

39. The notice required by the statute, as amended by chapter 155 of the Laws of 1888, to support an action against an employer for the instantaneous death of an employee, may be given by some one in his behalf within thirty days from the occurrence of the accident, or by the executor or administrator

within thirty days after his appointment. It was said that while adhering to the decision that the notice in *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, given by the widow, was sufficient, it seems more consistent with the probable intention of the legislature to hold also that, as an alternative, in the contingencies expressly mentioned in the statute, notice may be also given by an executor or administrator. *Daley v. New Jersey Steel & Iron Co.*, 155 Mass. 1, 29 N. E. 507; *Jones v. Boston & Albany R. Co.*, 157 Mass. 51, 31 N. E. 728.

wards appointed administrator cannot give such notice before such appointment.<sup>40</sup>

A notice signed by a firm of attorneys, as attorneys for such employee, purports to be signed in behalf of such employee within the provision of the statute; and in the absence of evidence to the contrary, sufficiently shows that they were authorized to sign it.<sup>41</sup>

So a notice signed by one retained to give the notice, by his stenographer, by his authority, is sufficient.<sup>42</sup>

### § 809. Contents.

Notice of the (1) time, (2) place and (3) cause of the injury is usually required.

The notice need not be of such technical form and perfection that it satisfy the tests to be applied to a pleading, since in that case it would demand a skill in preparation entirely beyond the capacity of a layman.<sup>43</sup>

But while the notice required is not to be construed with technical strictness, enough must appear to at least show that it was intended as the basis of a claim against the defendant and was given in behalf of the person who brings the suit.<sup>44</sup>

Under a statute requiring that the notice should "claim damages or payment" for the injuries, there need be no explicit claim of damages but it is sufficient that it appear from the notice that it was intended as a basis of claim.<sup>45</sup>

Failure to state the amount of the claim has been held not fatal in Kansas.<sup>46</sup>

40. *Lukkonen v. Fore River Ship Bldg. Co.*, 197 Mass. 586, 84 N. E. 299.

41. *Dolan v. Alley*, 153 Mass. 380, 26 N. E. 989. Formal proof of authority of attorney is unnecessary, in absence of evidence to the contrary. *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137.

42. *Greenstein v. Chick*, 187 Mass. 157, 72 N. E. 955, where

signature was "David Benshimol, per H. B."

43. *Finnigan v. N. Y. Contracting Co.*, 194 N. Y. 244.

44. *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003.

45. *Carroll v. New York, N. H. & H. R. R. Co.*, 182 Mass. 237, 65 N. E. 89.

46. *Smith v. Chicago, R. I. & P. R. Co.*, 82 Kan. 136, 107 Pac. 635.

Where the servant dies, but not immediately, the notice need not, under the Massachusetts statute, allege that the intestate left a widow or next of kin who at the time of his death were dependent on his wages for support.<sup>47</sup>

#### Time.

That the notice did not state the time of the injury has been the subject of no decisions in this country. It would seem that the hour and minute need not be stated but that it is sufficient to state the year, month and day on which the accident happened.

#### Place.

The notice must also locate the place of the accident.<sup>48</sup>

And in this respect it would seem that the notice should be more specific than in relation to the time, although in several instances it has been held that a description of the place, even if conceded to be insufficient, could not have misled the employer, and therefore was not a fatal defect.<sup>49</sup>

#### Cause of injury.

Nearly all the cases where the question of the sufficiency of the notice has been involved relate to the statement of the cause of the injury.<sup>50</sup>

47. *Bartley v. Boston & N. S. R. Co.*, 198 Mass. 163, 83 N. E. 1093.

48. *Flanagan v. F. W. Carlin Const. Co.*, 134 App. Div. 236, 118 N. Y. Supp. 953 (holding statement of place of injury as "at or in the vicinity of the Manhattan terminal of the Williamsburgh bridge" insufficient); *Miller v. Solvay Process Co.*, 109 App. Div. 135, 95 N. Y. Supp. 1020 ("in the yard" of defendant, insufficient).

49. See *infra*, § 816.

50. Notices held to sufficiently state the "cause of the injury," see *Bertolami v. United Engineering & Contracting Co.*, 198 N. Y. 71,

91 N. E. 267; *Foster v. B. I. Crooker & Co.*, 126 N. Y. Supp. 1020; *Palin v. Cary Brick Co.*, 133 App. Div. 483, 117 N. Y. Supp. 1072; *Scott v. Dillon*, 125 App. Div. 475, 109 N. Y. Supp. 875; *United States Gypsum Co. v. Sliwienska*, 183 Fed. 688; *Pennsylvania Steel Co. v. Lakkonen*, 181 Fed. 325; *Castner Electrolytic Alkali Co.*, 154 Fed. 938; *Berger v. Metropolitan Press Printing Co.*, 55 Wash. 422, 104 Pac. 617; *Matrusciello v. Milliken Bros.*, 129 App. Div. 661, 114 N. Y. Supp. 223; *Bauregard v. Webb Granite & Construction Co.*, 160 Mass. 201, 35 N. E. 555; *Lynch v. Allyn*,

It is not enough to specify the time and place of the accident, although that would guide the employer to some extent in making an investigation, which is one of the objects of requiring notice. The statute in New York and most of the states having a like statute says that "the cause of the injury" must also be stated, and this means that the accident should be so described that a person of

160 Mass. 248, 35 N. E. 550; Donahue v. Old Colony R. Co., 153 Mass. 356, 26 N. E. 868. See also Hardt v. Chicago, M. & St. P. R. Co., 130 Wis. 512, 110 N. W. 427. Notices held not to sufficiently state the "cause of the injury," see Logerto v. Central Bldg. Co., 198 N. Y. 390, 91 N. E. 782; Carlin v. New York Dock Co., 137 App. Div. 71, 122 N. Y. Supp. 57; Welch v. Waterbury Co., 128 N. Y. Supp. 974; Thompson v. Post & McCord, 128 N. Y. Supp. 220; Miller v. Solvay Process Co., 109 App. Div. 135, 95 N. Y. Supp. 1020; Bertolami v. United Engineering & Contracting Co., 132 App. Div. 804, 117 N. Y. Supp. 826 [reversed in 198 N. Y. 71, 91 N. E. 267, where notice held sufficient]; Bovi v. Hess, 123 App. Div. 389, 107 N. Y. Supp. 1001; Ortolano v. Degnon Contracting Co., 120 App. Div. 595, 104 N. Y. Supp. 1064. A notice to a railroad company that a brakeman on a certain day was injured on the railroad within one hundred yards northerly of a station named, by being caught between a car and a locomotive engine, by reason of a broken draw bar upon the car, which permitted the tender of the engine to run up against the end of the car and crush his leg, is sufficient notice of the time, place and

cause of the injury. Donahue v. Old Colony R. Co., 153 Mass. 356, 26 N. E. 868. The notice to be given under the provisions of said act is sufficient, which clearly states the time and place of the accident and recites that the injured person was "thrown from and run over by a car on a gravel train and seriously injured by the negligent management of said train on the said switch by some one then and there in the employ of the city, and who was intrusted with and exercising superintendence over the work in which I was then engaged or who had charge or control of the switch, locomotive, engine or train then and there operating as aforesaid," with a further statement that the train, temporary track and switch were defective and unfit for use and that the injury was caused thereby. Coughlan v. Cambridge, 166 Mass. 268, 44 N. E. 218. A notice to an employer that at a time and place named his servant was instantly killed by the falling of a derrick upon him, on account of the same being improperly or insecurely fastened, sufficiently states the cause of the injury to permit a recovery under this statute. Brick v. Bosworth, 162 Mass. 334, 39 N. E. 36.

ordinary intelligence who knew nothing about it could understand how it happened.<sup>51</sup>

A notice, in stating the cause of injury, should with reasonable definiteness and completeness, in however informal and inartistic manner, indicate the negligent or wrongful misconduct of the employer really claimed to have been the cause of the accident, and really relied on as the basis of the complaint against him, that he may, by virtue of such seasonable notice, investigate and prepare to defend against the charge thereafter actually to be prosecuted.<sup>52</sup>

Facts and not conclusions must be stated, although the facts need not be stated with the detail or accuracy of a pleading or bill of particulars.<sup>53</sup>

At one time it had apparently become more or less common in New York to set forth in the notice the legal cause of the injury without setting forth the facts as to how the injury happened, or to set forth such facts in the briefest manner, and sometimes a blanket form covering all the legal duties of a master to a servant was used, without setting forth the facts of the accident. Thus, a notice would state the time and place of the accident and then state the accident was caused by the failure of the employer to furnish a safe place to work or safe appliances or competent co-servants or a sufficient force of servants, or the failure to make and promulgate rules, etc., without stating any facts, or make a shot gun statement that the injury was caused by the omission of all such legal duties, specifying them, without setting forth the facts. These were condemned and held insufficient,<sup>54</sup> and the rule

51. *Simpson v. Foundation Co.*, N. Y., 95 N. E. 10.

52. *Finnigan v. New York Contracting Co.*, 194 N. Y. 244.

53. *Glynn v. New York C. & H. R. R. Co.*, 125 App. Div. 186, 109 N. Y. Supp. 103.

54. A notice stating that the injuries were caused solely by failure to furnish a safe place to work,

and failure to safeguard said place, and failure to furnish suitable tools, appliances and apparatus, ways, works and machinery in connection with the work the employee was obliged to do, and failure to properly inspect, guard and protect the place where he was at work, and failure to furnish him with a competent foreman and co-employees,



now is in New York that the notice is sufficient if it contains an honest and fairly accurate statement of the physical cause of the injury, without referring to the particular duty violated by the employer.<sup>55</sup>

So where the notice describes with substantial accuracy and completeness the exact physical cause of the injuries, it seems that mistakes in stating the particular legal duty

and failure to formulate, promulgate and enforce proper rules and regulations for the safety of employees in the performance of their duties, does not comply with the statute; first, by reason of the number of independent grounds of negligence stated and not in any manner actually relied upon; second, because there is no statement which fairly and completely described the cause of the accident or disclosed the facts. *Finnigan v. N. Y. Contracting Co.*, 194 N. Y. 244, 87 N. E. 424, 21 L. R. A. 233, n. s. It is not sufficient to merely state in general terms the neglected duties of the master, as by stating that the cause of the injury was the defendant's negligence in failing to furnish a safe place to work. (*Kennedy v. New York Telephone Co.*, 125 App. Div. 846, 110 N. Y. Supp. 887), or the like. (*Galino v. Fleischmann Realty & Const. Co.*, 130 App. Div. 605, 115 N. Y. Supp. 334; *Barry v. Derby Desk Co.*, 121 App. Div. 810, 106 N. Y. Supp. 575). A notice which alleges a failure to provide "proper protection," but does not point out the kind of protection needed, nor the nature of the work in which the plaintiff was engaged, nor "indicate what the real, producing trouble in this

case was as distinguished from many others which might have existed," although it says that he was struck by a bucket and caused to fall into a pit, but does not state what he was doing, why the bucket struck him, where he fell from, or under what circumstances he fell, is insufficient. Upon reading the notice, the employer could not tell whether something broke, or whether the accident was caused by some defect in machinery, or through careless operation, or the failure to give warning, or through any particular act of omission or commission. The allegation of a failure to provide proper protection is too general, for that is simply an allegation of negligence, with "no statement which fairly and completely described the cause of the accident." *Simpson v. Foundation Co.*, N. Y., 95 N. E. 10.

55. *Valentino v. Garvin Machine Co.*, 139 App. Div. 139, 123 N. Y. Supp. 959. A notice containing a sufficiently accurate statement of the physical cause of the injury is not fatally defective although it fails to specify the particular violation of the master's duty out of which the negligent cause of the injury arose. *Impellizieri v. Crauford*, 126 N. Y. Supp. 644.



omitted do not render the notice insufficient,<sup>56</sup> nor does the total absence of such a statement or a shot gun statement of the omission of all the duties owing a servant by the master.

"The accident should be so identified that the master's attention is called to the exact occurrence," and the notice "must reasonably describe the accident."<sup>57</sup>

And it is very clear that a mere statement that plaintiff was injured "while at work on electrical appliances" while at work for defendant and "has placed his case in my hands for adjustment" is insufficient.<sup>58</sup>

While the notice may allege different causes of the same accident, adequately stating each cause,<sup>59</sup> yet plaintiff

56. *Bertolami v. United Engineering & C. Co.*, 198 N. Y. 71 [followed in *Martin v. Walker & Williams Mfg. Co.*, 198 N. Y. 324, where the notice omitted to specify as the ground of negligence the failure to comply with section 81 of the Labor Law].

57. *Logerto v. Central Building Co.*, 198 N. Y. 390, 394, 91 N. E. 782. In that case the notice stated at length all the possible statutory grounds of liability, but the only allusion to the accident or cause of injury was in the statement that "as a result of all which certain earth, stone and material was caused and permitted to fall upon and seriously injure me." It was held that this did not reasonably and sufficiently describe the accident or occurrence. A notice "that said injuries were caused . . . solely by your (the appellant's) negligence, . . . in that your foreman having and exercising superintendence over and in connection with me, negligently conducted himself in connection with said acts of superintendence

and negligently and without warning started the machine in connection with which I was working, as a result of which I was caught in the gears and received the injuries aforesaid," apprised the employer with reasonable certainty of the real cause of the accident. The material thing least identified was the machine on which respondent was working and in which he was caught. But with the other details which are given of time and place, this lack of definiteness was held not sufficiently serious to invalidate the notice, within the cases of *Bertolami v. United Engineering & Contracting Co.*, 198 N. Y. 71, 91 N. E. 267; *Hurley v. Olcott*, 198 N. Y. 132, 91 N. E. 270; *Logerto v. Central Building Co.*, 198 N. Y. 390, 91 N. E. 782. So held in *Smith v. Milliken Bros.*, 200 N. Y. 21, 93 N. E. 184.

58. *Grebenstein v. Stone & Webster Engineering Co.*, Mass., 95 N. E. 503.

59. *Coughlan v. City of Cambridge*, 166 Mass. 268, 44 N. E. 218.

is not bound to ascertain and notify the defendant of all the causes to which the defect which occasioned his injury is attributed. It is sufficient if it states a cause which occurred, under such circumstances as would render the defendant responsible.<sup>60</sup>

A notice is not insufficient because it does not specify the name, grade or duties of the particular person representing defendant and through whom it acted when guilty of the alleged omissions, nor because it does not state that the negligent employee was one acting as or exercising the duties of a superintendent;<sup>61</sup> and a statement of negligence on the part of the master is sufficient although in fact the negligence was that of a superintendent.<sup>62</sup>

In Wisconsin, it has been held that a notice is not insufficient because it does not expressly allege that the damage was caused by the defendant.<sup>63</sup>

#### § 810. Signature.

The notice must be signed by the person injured or some one in his behalf.<sup>64</sup>

The fact that a notice was produced by and in behalf of the plaintiff on the trial of the action is sufficient at least to create a presumption that it was signed by him or in his behalf within the meaning of the statute.<sup>65</sup>

#### § 811. Construction.

The notice is not to be strictly construed.<sup>66</sup>

#### § 812. Amendments.

Although there are no decisions on the subject, it is undoubtedly true that the notice cannot be materially amended after the suit is brought.

60. *Dolan v. Alley*, 153 Mass. 380, 23 N. E. 989.

61. *Bertolami v. United Engineering & C. Co.*, 198 N. Y. 71.

62. *Berube v. Horton*, 199 Mass. 421, 85 N. E. 474.

63. *Hardt v. Chicago, M. & St. R. Co.*, 130 Wis. 512, 110 N. W. 427.

64. See *supra*, who may or must give notice, § 808.

65. *Smith v. Milliken Bros.*, 200 N. Y. 21, 93 N. E. 184.

66. *Grebenstein v. Stone & Webster Engineering Co.*, Mass., 95 N. E. 503; *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003.

**§ 813. On whom notice to be served.**

The New York statute provides that the notice shall be served on the employer, or on one of them if more than one; and if the employer is a corporation by delivering or sending it to the office or principal place of business of such corporation.

Under a statute requiring notice to be given "to the employer," it has been held sufficient to serve the notice on a clerk;<sup>67</sup> or on a freight agent or attorney, such notices having been received without objection for a period of years.<sup>68</sup>

Service of notice on a corporation by delivering a copy to the president of that company, stating that the injury was by being thrown from the cars of that company, is not sufficient to support an action against another company of which the same person was president, although the railroad had recently been leased to the latter company.<sup>69</sup>

Where the employer is a foreign corporation, notice cannot be served, in Massachusetts, upon the commissioner of corporations made its attorney to receive service of legal process, and it is immaterial that the latter sent it to the company.<sup>70</sup>

In Kansas, service of the notice on a railroad company may be made on one appointed by the company to receive service of process or by leaving a copy thereof at any depot or station with the railroad employee in charge thereof.<sup>71</sup>

Notice sent by mail to an assistant claim agent of a railroad whose duty it is to act on such claims is sufficient, where received and acted on by him.<sup>72</sup>

67. *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177, 53 N. E. 396.

68. *De Forge v. New York, N. H. & H. R. Co.*, 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464.

69. *Harding v. Lynn & Boston R. Co.*, 172 Mass. 415, 52 N. E. 535.

70. *Healey v. George F. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 270.

71. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136. Service on ticket agent is sufficient. *St. Louis & S. F. R. Co. v. Burgess*, 72 Kan. 454, 83 Pac. 991.

72. *Smith v. Missouri Pac. R. Co.*, 82 Kan. 248, 108 Pac. 76.

**§ 814. Mode of service.**

The notice may be served, the New York statute provides, by (1) delivering it to or at the residence or place of business of the person on whom it is to be served, or (2) by mailing it to the last known place of residence or place of business of the employer; and if the employer is a corporation the delivery or mail should be to the office or principal place of business of the corporation.

In Massachusetts no fixed form of service is prescribed,<sup>73</sup> and the same is true in the most, if not all of the other states. Where the statute authorizes service by mail, deposit in the post office is sufficient although the notice is not received by the addressee.<sup>74</sup>

**§ 815. Demand for further notice.**

The New York statute was amended in 1910,<sup>75</sup> by adding the following provision: "If such notice does not apprise the employer of the time, place or cause of injury, he may within eight days after service thereof, serve upon the sender a written demand for a further notice, which demand must specify the particular in which the first notice is claimed to be defective, and a failure by the employer to make such demand as herein provided shall be a waiver of all defects that the notice may contain. After service of such demand as herein provided, the sender of such notice may at any time within eight days thereafter serve an amended notice which shall supersede such first notice and have the same effect as an original notice hereunder."

The statute makes the same provisions as to service by mail of the demand as are provided for as to service of the notice. In Massachusetts, the general statute in regard to a counter notice in highway cases is made applicable to actions under the Employers' Liability Act; and it is held that this provision that defendant must give a counter

73. *Shea v. New York, N. H. & H. R. Co.*, 173 Mass. 177, 53 N. E. 396, holding it sufficient that notice

comes into the hands of the employer within the prescribed time.

74. *Hurley v. Olcott*, 198 N. Y. 132, 91 N. E. 270.

notice within five days in order to avail himself in defense of any action of any "omission" to state in the notice the time, place, or cause of the injury, does not apply to an "inaccuracy" although it consists of a want of particularity in the description rather than a misstatement.<sup>75</sup>

The New York statute does not use the word "omission" and it is submitted that it applies to insufficiency of description as well as a total omission to state either the time, or the place, or the cause, of the injury.

#### § 816. Effect of mistakes or defects in.

A notice is not insufficient, the New York statute provides, solely by reason of any unintentional "inaccuracy" in stating the time, place or cause of the injury "if it be shown (1) that there was no intention to mislead and (2) that the party entitled to notice was not misled thereby."<sup>76</sup>

But a notice cannot be saved under the provision where there has been no physical cause stated at all,<sup>76a</sup> since this provision protects a notice which is merely inaccurate in giving some detail contemplated by the statute, but does not excuse an utter omission to state some substantial fact.<sup>77</sup>

But, under this provision, a statement of the place of the accident as "the village of Seneca Falls," has been held sufficient.<sup>78</sup>

It has been held in New York, under this provision, that the exact knowledge of the particulars of the accident, obtained elsewhere by the master, cures defects in the

75. Laws 1910, c. 352.

76. *Tobin v. Inhabitants of Brimfield*, 182 Mass. 117.

76. Same rule in Massachusetts. *Drommie v. Hogan*, 153 Mass. 29, 28 N. E. 237.

76a. *Finnigan v. New York Contracting Co.*, 194 N. Y. 244; *Thompson v. Post & McCord*, 128 N. Y. Supp. 220. Contra, see *Miller v. Camp Bird*, 46 Colo. 569, 105 Pac. 1105, where only statement was  
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that plaintiff was injured "in the left eye, on Nov. 14, 1902, in Camp Bird mine."

77. *Finnigan v. New York Contracting Co.*, 194 N. Y. 244.

78. *English v. Milliken Bros.*, 132 App. Div. 501, 118 N. Y. Supp. 31. To same effect, *Deon v. McClintic-Marshall Const. Co.*, 114 N. Y. Supp. 28; *Heffron v. Lackawanna Steel Co.*, 121 App. Div. 35, 105 N. Y. Supp. 429.

notice,<sup>79</sup> but the better rule is that where only conclusions are stated and the duty violated by the employer, the notice is wholly defective and cannot be cured by this provision,<sup>80</sup> i. e., that knowledge acquired by the employer in some other way cannot cure the failure to state a substantial fact, such as the cause of the injury. If the notice is insufficient but it is claimed it was not misleading it seems that it devolves on plaintiff to show that there was no intention to mislead and that defendant was not in fact misled thereby,<sup>81</sup> unless perhaps when it is self evident.

### § 817. Effect of notice.

Causes of the accident not enumerated in the notice cannot be proved,<sup>82</sup> nor can an entirely different cause.

But where the notice given charged negligence on the part of the defendant, it was sufficient to justify a recovery for negligence on the part of defendant's superintendent.<sup>83</sup>

If the notice states that plaintiff was in the employ of defendant at the time of the injury, plaintiff cannot claim that he was employed by a different company.<sup>84</sup>

Where the complaint is broad enough to embrace a common law as well as a statutory liability, the court may regard the notice as surplusage and submit the case under the common law.<sup>85</sup>

### § 818. Raising objection on trial.

It has been held that failure to object by demurrer, answer, or otherwise in the trial court, to the want of

79. *Heffron v. Lackawanna Steel Co.*, 121 App. Div. 35, 105 N. Y. Supp. 249. See also *Young v. Bradley & Son*, 129 App. Div. 678, 114 N. Y. Supp. 264. But see *Palmieri v. S. Pearson & Son*, 128 App. Div. 231, 112 N. Y. Supp. 684.

80. *Finnigan v. N. Y. Cont. Co.*, 194 N. Y. 424 [affirming 122 App. Div. 712, 107 N. Y. Supp. 855].

81. See *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. Supp. 307.

82. *Carron v. Standard Refrigerator Co.*, 138 App. Div. 723, 123 N. Y. Supp. 682.

83. *Berube v. Horton*, 199 Mass. 421, 85 N. E. 474.

84. *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. 134, 91 N. Y. Supp. 883.

85. *O'Neil v. Manufacturers' Automatic Sprinkler Co.*, 127 N. Y. Supp. 692.

notice, waives the necessity therefor,<sup>86</sup> although there is authority to the contrary.<sup>86</sup>

So it has been held that the want of notice need not be pleaded but may be urged by a motion to direct a verdict.<sup>87</sup>

**§ 819. Federal courts follow state decisions.**

The sufficiency of the notice will be determined in the federal courts by the law of the state in which the statute requiring the notice has been enacted.<sup>88</sup>

86. *Welsh v. Barber Asphalt Paving Co.*, 167 Fed. 465.

86. *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203.

87. *Simerson v. St. Louis & S. F. R. Co.*, 173 Fed. 612, 97 C. C. A. 618.

88. *Pennsylvania Steel Co. v. Lakkonen*, 181 Fed. 325; *United States Gypsum Co. v. Sliwenska*, 183 Fed. 688.

## CHAPTER IV.

## PLEADING.

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## I. GENERAL CONSIDERATIONS.

### § 820. Scope of chapter.

It is not within the scope of this work to consider in detail the rules of pleading applicable to actions in general but only in so far as they are peculiarly applicable to actions by a servant against his master to recover damages for personal injuries. For instance, it is unnecessary to state that a pleading is subject to attack where it is indefinite or uncertain, argumentative duplicitous, etc.; that surplusage is not fatal; that certain defects may be cured by verdict, etc. So the general rule that it is necessary to state facts and not mere conclusions need not be commented on.

So the general rules relating to amendments are applicable and a new or different cause of action cannot ordinarily be added by amendment, especially after limitations have run against such new cause of action.

### § 821. Variance between pleadings and proofs.

If plaintiff specifies in his complaint the act of negligence relied on, evidence of other negligence is not admis-

sible and there can be no recovery therefor, without an amendment. So where defendant sets up certain facts to show contributory negligence, he cannot prove other contributory negligence, at least without an amendment.<sup>89</sup>

If an action is brought under the common law, and not under the statute, plaintiff is not entitled to the benefits of the statutory provisions, but must be governed by the rules of the common law.<sup>90</sup>

On the other hand, if several grounds of negligence are set forth in the complaint, plaintiff may recover although he only proves one of them.<sup>91</sup>

So if common law and statutory grounds for recovery are alleged, a recovery may be had if the evidence is sufficient to prove either one of them.<sup>92</sup>

89. In an action brought under the statute the only cause of action alleged was for the negligence of an engineer, and at the trial the evidence was directed to an attempt to show that the person was yard master and that the injury was caused by his negligent and improper conduct. It was said: "The rules of pleading require that the allegations of a complaint, under this statute, shall show clearly the relation between the negligent party and the company which are relied upon, and the proofs must be confined to the allegations made." *Albrecht v. Milwaukee & Superior R. Co.*, 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30.

90. *Chisholm v. Manhattan R. Co.*, 116 App. Div. 320, 101 N. Y. Supp. 625; *Curran v. Manhattan R. Co.*, 118 App. Div. 347, 103 N. Y. Supp. 351. A common law action, pleaded and tried as such,

is not entitled to the benefits of the special rules laid down for controlling actions under the Employers' Liability Act. *Welch v. Waterbury & Co.*, 136 App. Div. 315, 120 N. Y. Supp. 1059.

91. *Bull v. Atlanta & C. A. L. R. Co.*, 149 N. C. 427, 63 S. E. 126; *Ft. Wayne & Wabash V. T. Co. v. Crosbie*, 169 Ind. 281, 81 N. E. 474; *Wilson v. Escanaba Woodenware Co.*, 152 Mich. 540, 116 N. W. 198.

92. *Mayse v. Northern Pac. R. Co.*, 41 Mont. 272, 108 Pac. 1062. Where a petition alleged negligence in employing incompetent servants and also a cause of action under the statute taking away the fellow-servant defense, a nonsuit should not be granted merely because the first ground of negligence was not proved. *Lewis v. Wabash R. Co.*, 142 Mo. App. 585, 121 S. W. 1090.

## II. COMPLAINT.

### § 822. General necessary allegations.

There are certain general allegations which must always be set forth expressly or appear as a necessary inference from the other facts alleged. The mode of alleging these necessary facts differs more or less in the various states and also depends to some extent on whether the common law or code system of pleading prevails in the particular state. However, it is generally necessary to allege or show, in a complaint, petition or declaration, in an action by a servant or his representatives against the master for damages for personal injuries, the following:

1. The business in which defendant was engaged at the time of the accident.
2. The facts as to the employment so as to show the relation of master and servant between plaintiff and defendant.<sup>93</sup>
3. The character of the services plaintiff was hired to perform, and that he was acting within the scope of his employment at the time of the injury.<sup>94</sup>
4. The facts creating the duty of the master which has not been performed.<sup>95</sup>
5. The facts to show the breach of the duty.<sup>96</sup>
6. The facts showing that the negligence alleged was the proximate cause of the injury.<sup>97</sup>

93. See *infra*, § 825.

94. As to scope of employment, see *infra*, § 826, this chapter. The allegations as to character of services may be general, where defective instruments is alleged, except that they should increase in definiteness as they relate to the particular instrumentality in question, and as to this they should be sufficiently specific to show the relationship of the service to the instrumentality. *Cedartown Cotton*

& Export Co. v. Miles, 2 Ga. App. 79.

95. *Brown v. Shirley Hill Coal Co.*, — Ind. App. —, 94 N. E. 574; *Pittsburgh, Cincinnati, C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218. See also *infra*, § 827, this chapter.

96. See *infra*, § 828. That the master was negligent must be shown. See *v. Leidecker*, 142 Ky. 752, 135 S. W. 284.

97. See *infra*, § 828.

7. In some jurisdictions, the plaintiff's lack of actual and implied knowledge of the danger.<sup>98</sup>

8. In some jurisdictions, the allegation that the injuries were sustained without fault or negligence on the part of the plaintiff.<sup>99</sup>

9. Where the facts alleged reasonably tend to establish some defense which would defeat the action, enough additional facts must be set out to negative this defense.<sup>100</sup>

10. Allegations of fact as to the extent of the injuries and the damages sustained.

### § 823. Mode of stating facts.

The allegations of the complaint should be plain, definite and unequivocal;<sup>101</sup> but the evidence which plaintiff expects to prove his allegations with need not be set forth.<sup>102</sup>

### § 824. Alleging ownership or control of appliance or place.

Where the negligence relied on is a defect in an appliance or the place of work, it must be alleged or shown that the defendant owned or controlled the appliance or place.<sup>103</sup>

98. See *infra*, § 832.

99. See *infra*, § 833.

100. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79.

101. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79.

102. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79. This proposition is stated in many master and servant cases but it is deemed to be so elementary that further citations are unnecessary.

103. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; *Troth v. Narcross*, 111 Mo. 630,

20 S. W. 297; *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187. But see *Dawson v. King* (Tex. Civ. App.) 121 S. W. 917, where allegation that defendant was plaintiff's employer in the work obviated the objection that the relation defendant sustained to the building was not stated. Complaint need not show how defendants were united in their joint adventure, whether by contract, partnership, or by some implication of the law. *Fulwider v. Trenton Gas, L. & P. Co.*, 216 Mo. 582, 116 S. W. 508.

### § 825. Alleging relation of master and servant.

The complaint must show that the relation of master and servant existed between defendant and plaintiff at the time of the injury complained of,<sup>104</sup> provided plaintiff relies on the duties owing to him as a servant by defendant as a master,<sup>105</sup> it not being sufficient to show that the relation existed both before and after the accident if it did not exist at the precise time of the injury.<sup>106</sup>

The rule in regard to the complaint when based on a common law cause of action, that it must allege or show the relation of master and servant, applies equally well where the cause of action is based on a statute.<sup>107</sup>

So this rule applies to a suit in admiralty as well as to other proceedings.<sup>108</sup>

It is not sufficient to merely allege employment by defendant's servants and agents,<sup>109</sup> and a complaint not showing whether plaintiff was employed as a servant of

104. *Walton v. Lindsay Lumber Co.*, 145 Ala. 661, 39 So. 670; *Logan v. Central Iron & Coal Co.*, 139 Ala. 548, 36 So. 729; *Fearon v. Mullins*, 35 Mont. 232; *Barowski v. Schultz*, 112 Wis. 415, 88 N. W. 236; *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760; *Simmerman v. Hills Creek Coal Co.*, — Ala. —, 54 So. 426; *Woodward Iron Co. v. Curl*, 153 Ala. 215, 44 So. 969. Alleging that plaintiff, at the time of receiving the injuries, was and had been employed by defendant for a long time prior thereto, was held sufficient. *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328. The complaint must show a contractual relation between the plaintiff and defendant. *St. Louis & S. F. R. Co. v. Brantley*, — Ala. —, 53 So. 305. Petition held to allege relation of master and servant between plain-

tiff and defendant receiver. *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

105. If not relied on, complaint need not state whether plaintiff was an employee or a mere trespasser. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92. See also *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384, 21 S. W. 731.

106. *Wabash R. Co. v. Erb*, 36 Ind. App. 650, 73 N. E. 939, 114 Am. St. Rep. 392, where servant was injured while riding home on a railroad velocipede.

107. *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760; *Travis v. Sloss-Sheffield Steel & Iron Co.*, 162 Ala. 605, 50 So. 108.

108. See *The Conde Wifredo*, 77 Fed. 324, 23 C. C. A. 187.

109. *Whalan v. Whipple (R.I.)*, 13 Atl. 107.

defendants or of an independent contractor has been held insufficient.<sup>110</sup>

So alleging that plaintiff was working in the mine of defendant is not equivalent to an allegation that he was an employee of defendant.<sup>111</sup>

But it is not necessary that there be an express averment that the relation of master and servant exists if the facts showing such relation appear from the complaint;<sup>112</sup> and averments only indirectly alleging the relation of master and servant, are sufficient after verdict.<sup>113</sup>

If the facts set out in the complaint show that the relation of master and servant existed, a recovery from defendant under the law of master and servant is allowable, notwithstanding the conclusion of the pleader that he was a passenger rather than an employee.<sup>114</sup>

**§ 826. Alleging that injured servant was acting within scope of employment.**

The complaint must allege or show that the injured servant, at the time of the accident, was acting within the scope of his employment.<sup>115</sup>

It is sufficient to merely set out the facts showing that plaintiff was acting within the scope of his employment,<sup>116</sup>

110. *Boardman v. Creighton*, 93 Me. 17 44 Atl. 121.

111. *Whitmore v. Alabama Cons. C. & I. Co.*, 164 Ala. 125.

112. See *Poor v. Madison River Power Co.*, 38 Mont. 341, 99 Pac. 946, where it was alleged deceased was "employed and hired" by defendant and "was engaged in the performance of his duty under his employment. But compare *Sloss-Sheffield Steel & Iron Co. v. Chamblee*, 159 Ala. 185, 48 So. 664.

113. *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455.

114. *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141.

115. *Stagg v. Edward Western Tea & Spice Co.*, 169 Mo. 489, 69 S. W. 391; *Cleveland, C. C. & St.*

*L. R. Co. v. Perkins*, 171 Ind. 307, 86 N. E. 405. Allegations held sufficient, see *Newport News Pub. Co. v. Beaumeister*, 104 Va. 744, 52 S. E. 627; *Kirby Lumber Co. v. Chambers*, 41 Tex. Civ. App. 632, 95 S. W. 607. Alleging that defendant ordered plaintiff to perform certain labor, and that while engaged in such labor, under the direction of his foreman, plaintiff was injured through defendant's negligence is sufficient to show that plaintiff was acting within the scope of his employment. *American Car & Foundry Co. v. Hill*, 226 Ill. 227, 80 N. E. 784.

116. See *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514.

since it is not necessary to expressly state that the servant was acting within the scope of his employment.<sup>117</sup>

In some jurisdictions it is sufficient to merely allege the general conclusion that plaintiff was at the time of his injury in the active discharge of his duties incident to his employment.<sup>118</sup>

In Alabama, alleging that the injury occurred while plaintiff was doing an act "while in the performance of his duties" is sufficient;<sup>119</sup> but alleging that plaintiff was injured while in the employment of defendant is not equivalent to alleging that he was in the discharge of any duty imposed upon him by his employment at the time of his injury.<sup>120</sup>

So an allegation that the servant was injured while working in a certain place "where he had a right to be" is not equivalent to an allegation that the servant was engaged in or about the business of the defendant.<sup>121</sup>

And an allegation that the injured servant was in the service or employment of the defendant in or about the operation of the defendant's mine is not the equivalent of an allegation that he was at the time engaged in or about the business of the defendant.<sup>122</sup>

But alleging that plaintiff "was engaged in and about said business of the defendant" has been held sufficient.<sup>123</sup>

Indefinite allegations as to the particular work plaintiff was doing at the time of the injury can generally be

117. *Moellman v. Gieze-Hensel-Meier Lumber Co.*, 134 Mo. App., 485, 114 S. W. 1023. Alleging that it was necessary for plaintiff to go about the grounds in search of wood," the injury occurring while so doing, is sufficient. *United States Cement Co. v. Whitted*, — Ind. App.—, 90 N. E. 481.

118. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

119. *Green v. Bessemer Coal,*

*I. & L. Co.*, 162 Ala. 609, 50 So. 289. Compare *Chicago & E. I. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044.

120. *Woodward Iron Co. v. Curl*, 153 Ala. 215.

121. *Adams v. Southern R. Co.*, 166 Ala. 449.

122. *Green v. Bessemer Coal, I. & L. Co.*, 162 Ala. 609.

123. *Sloss-Sheffield Steel & Iron Co. v. Chamblee*, 159 Ala. 185, 48 So. 664.



attacked only by special demurrer,<sup>124</sup> or motion to make more definite and certain.

### § 827. Allegation of existence of duty.

The complaint must show the particular duty toward the servant which the master failed to perform.<sup>125</sup>

But while it is generally the better practice to distinctly allege the duties of the defendant to the plaintiff charged to have been violated, yet if what is alleged in connection with averring a breach of those duties sufficiently shows what such duties are, the complaint is sufficient.<sup>126</sup>

It has been said that "an express allegation of the master's duty is unnecessary and will not sustain or aid a pleading. The facts and circumstances from which the duty arises must be set out in the declaration, and the pleading is sufficient if the law implies a duty from the facts and circumstances stated."<sup>127</sup>

And a mere allegation of duty, without stating the facts on which it rests, is insufficient;<sup>128</sup> and where a paragraph

124. *Fearon v. Mullins*, 35 Mont. 232.

125. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; *Cleveland, C. C. & St. L. R. Co. v. Morrey*, 172 Ind. 513; *Knahtla v. Oregon Short Line & U. L. R. Co.*, 21 Or. 136, 27 Pac. 91. A duty to another cannot be implied from the mere allegation that the act was negligently done. *Cleveland, etc., R. Co. v. Morrey*, supra, this note. A general charge of negligence in the doing or omitting to do a particular act is not sufficient unless there is also shown a duty to the plaintiff as servant imposed upon the defendant as master. *Thomas Madden Son & Co. v. Wilcox*, — Ind. App. — 89 N. E. 955.

126. *Squilache v. Tidewater Coal & Coke Co.*, 64 W. Va. 337,

62 S. E. 446; *City of Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Esslinger v. Boehm*, — N. J. L. —, 79 Atl. 267. Where, from the facts alleged, the duty of the defendant may be implied, that is all that is necessary. *Cristanelli v. Saginaw Mining Co.*, 154 Mich. 423, 439, 119 N. W. 910.

127. *Cetofonte v. Camden Coke Co.*, 78 N. J. L. 662. Need not allege that the master "contracted" to furnish a safe place to work. *Beyer v. Hamburg-American S. S. Co.*, 171 Fed. 582.

128. *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455; *Chicago, I. & L. R. Co. v. Barker*, 169 Ind. 670; *Pittsburgh, C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218.



of the complaint merely sets forth the bare legal conclusion of the duty of the master, the facts as to which are set forth in other paragraphs of the complaint, it has been held that it is proper to strike it out as surplusage on motion.<sup>129</sup>

The complaint is subject to attack if it alleges a higher grade of duty than the law imposes,<sup>130</sup> although it would seem that the complaint should be demurrable only where the facts themselves fail to show a want of ordinary care.

Where the allegation of duty on the part of the master is in the alternative, if one of the alternatives fails to present a cause of action, the complaint is bad.<sup>131</sup>

#### § 828. Alleging negligence or breach of duty.

The facts showing the existence of a duty having been alleged, it is next necessary to state facts showing the negligence which consists of a breach of that duty. Generally the complaint alleges the facts occurring immediately preceding the injury which of themselves show wherein defendant was negligent, and then alleges that he "negligently" failed to perform the duty the breach of which is relied on.

Negligence must be expressly alleged or appear by legal intendment from what is alleged.<sup>132</sup>

It is not sufficient to merely allege that plaintiff was not guilty of contributory negligence.<sup>133</sup>

But no express allegation that a specified act of the master or of alleged negligent servant was a breach of his duty is necessary where it is self evident.<sup>134</sup>

129. *Green v. Indian Gold Min. Co.*, 120 Fed. 715.

130. *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441; *Norfolk & W. R. Co. v. Jackson's Adm'r*, 85 Va. 489, 85 E. 370; *Canter v. Colorado United Min. Co.*, 35 Fed. 41. See also *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. 272.

131. *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 284.

132. *Cox v. Providence Gas Co.*, 17 R. I. 199, 21 Atl. 344.

133. *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

134. *Longhemy v. Mineral Point & N. R. Co.*, 135 Wis. 139, 115 N. W. 335.

The specific acts or omissions relied upon as constituting the breach of duty must be alleged,<sup>135</sup> although in many jurisdictions it is stated that it is sufficient to allege negligence in general terms;<sup>136</sup> but this does not mean that it is sufficient to merely allege that plaintiff was injured "by the negligence of defendant," but means that it is sufficient if the act stated as the cause of the injury is alleged to have been "negligently" done.<sup>137</sup>

However, some states, including Alabama, Kentucky and Michigan, go very far in sustaining complaints made up largely of conclusions, at least as against a general demurrer.<sup>138</sup>

While, in alleging negligence, facts must be stated,<sup>139</sup>

135. *Klawiter v. Jones*, 219 Ill. 626, 76 N. E. 673.

136. *Pigeon v. Fuller*, 156 Cal. 693. Where the facts showing the legal duty of the master are set forth, the general allegation of negligence has been held to sufficiently show a breach of duty. *Cleveland, C. C. & St. L. R. Co. v. Morrey*, 172 Ind. 513. After showing the existence of a duty on the part of defendant by appropriate allegations, it is proper to predicate negligence charged in general terms upon any act or omission by which it is claimed that duty was violated. *Thomas Madden Son & Co. v. Wilcox*, — Ind. App. —, 89 N. E. 955. In Georgia, a petition containing general allegations of negligence, without setting forth any specific acts of negligence, is subject to a special, but not to a general, demurrer. *Seaboard Air Line R. Co. v. Pierce*, 120 Ga. 230, 47 S. E. 581; *Miller v. Merchants and Miners T. Co.*, 115 Ga. 1009, 42 S. E. 385.

137. *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415.

138. Need not set out facts to show negligence. *Cristanelli v. Saginaw Mining Co.*, 154 Mich. 423, 434, 117 N. W. 910. In Kentucky, negligence may be alleged generally, without setting out the facts constituting the negligence. *Pittsburg, C. C. & St. L. R. Co. v. Schaub*, 136 Ky. 652, 124 S. W. 885, holding sufficient an allegation that defendant knew, or by ordinary care could have known, that plaintiff was under the car, and with this knowledge by gross negligence backed the car upon him. Under the system of pleading in Alabama, it is held that very general averments of negligence falling but little short of mere conclusions are sufficient in the complaint. *Southern Car & Foundry Co. v. Bartlett*, 137 Ala. 234, 34 So. 20; *Louisville & N. R. Co. v. Jones*, 130 Ala. 456, 30 So. 586.

139. *Chesapeake & O. R. Co. v. Melton*, 110 Va. 728; *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329; *La Porte v. Cook*, 20 R. I. 261, 38 Atl. 700. The facts constituting the negli-

although evidence need not be pleaded,<sup>140</sup> yet the general rule is that in pleading negligence the details or particulars of the act causing the injury need not be alleged,<sup>141</sup> but they may be required to be stated in some states by a special demurrer and in others by a motion to make the complaint more definite and certain or a motion for a bill of particulars.

If the servant was killed and the action is brought by his administrator, it seems that less particularity in the averments of negligence is necessary, and mere conclusions as to negligence may be sufficient.<sup>142</sup>

#### Necessity for express averment of negligence.

While it is customary to allege that an act was done negligently, yet where the pleader states facts from which the law will raise a duty, and shows an omission of the duty and resulting injury, an averment that the act was negligent is unnecessary in personal injury suits in general,<sup>143</sup> and the same rule applies to an action by a servant against his master.<sup>144</sup>

gence need not be set out but it is sufficient to allege the acts the doing of which caused the injury, and then state that such acts were negligently done. *Walsh v. Western R. Co.*, 34 Fla. 1, 15 So. 686. An allegation of negligence that the railway engine of defendant was wilfully, carelessly, negligently and wrongfully, run into, upon and against said hand car, is too general; and also an allegation that those in control and operating such engine in disregard of their duty to exercise reasonable and proper care not to injure plaintiff, had negligently, carelessly, etc., run the said engine into, upon and against the said hand-car, thereby causing the injuries complained of. *Chesapeake*

& O. R. Co. v. Melton, 110 Va. 728, 67 S. E. 346.

140. *Lindgren v. Minneapolis & St. L. R. Co.*, 86 Minn. 152, 90 N. W. 381.

141. Where negligence in giving orders is relied on, it is not necessary to allege in what particular or respect the orders were negligent. *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 213, 40 So. 280.

142. *Birmingham R. L. & P. Co. v. Mosely*, 164 Ala. 111.

143. 29 Cyc. 569.

144. There need be no direct averment that the injury was the result of negligence on defendant's part, where it appears from the facts alleged. *Romona Oolitic Stone Co. v. Johnson*, 6 Ind. App. 550, 33 N. E. p. 1000.

It follows that it is not fatal to use the phrase "carelessly or negligently."<sup>145</sup>

Since failure to observe a duty imposed by a mandatory statute is negligence per se, it need not be alleged that the failure to observe the statute was negligent.<sup>146</sup>

**Where statute makes accident itself proof of negligence.**

Under statutes making proof of injury prima facie evidence of negligence, a complaint is sufficient which merely states the relation of master and servant and the physical cause of the injury.<sup>147</sup>

**Alleging negligence as that of defendant when in fact negligence of servant.**

It often happens that when the negligent act or omission was primarily that of another servant, the negligence is alleged in the complaint as that of the defendant rather than of his servant. And it has been held in New York that the negligence should be alleged as that of the defendant although in fact it was that of an employee.<sup>148</sup>

So, in Indiana, in a common law action, it is sufficient to allege that the negligence relied on was that of the defendant, although in point of fact it was that of a servant for whose acts defendant was responsible;<sup>149</sup> and under an Employers' Liability Act it has been held that an allegation of defendant's negligence includes that of the servant.<sup>150</sup>

145. *Mascot Coal Co. v. Garrett*, 156 Ala. 290.

146. *Sloss-Sheffield S. & I. Co. v. Sharpe*, 161 Ala. 432.

147. *Hudson v. Mississippi Cent. R. Co.*, 95 Miss. 41, 48 So. 289.

148. *Harris v. Baltimore Machine & Elevator Co.*, 112 App. Div. 389, 98 N. Y. Supp. 440. In New York, a general charge of negligence of "defendant, its agents and

servants" is sufficient, in the absence of a demand for a bill of particulars or a motion to make more definite and certain. *Schradin v. New York, C. & H. R. R. Co.*, 124 App. Div. 765, 109 N. Y. Supp. 428.

149. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660.

150. *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943.

It is proper to allege the negligence as that of defendant, "by its agents and employees."<sup>151</sup>

An allegation that a corporation did a certain act is equivalent to an allegation that the corporation did it by its servants and agents.<sup>152</sup>

Where the negligent acts are alleged to have done by the defendant corporation itself, it is held in most jurisdictions that the question of fellow-servants cannot be raised by demurrer,<sup>153</sup> but in other jurisdictions such a complaint is demurrable for failure to state the relation to the corporation of the person who did the act complained of.<sup>154</sup>

The true rule would seem to be, independent of statute, that when the negligence of the master consists in the violation of a non-delegable duty, it is immaterial what particular servant of the corporation was negligent in performing or failing to perform such duty, and that the

151. *Hoosier Stone Co. v. McCain*, 136 Ind. 398, 31 N. E. 956. Alleging negligence on the part of defendant, its servants, or agents, is not demurrable, since the purpose is to charge negligence against defendant acting through its servants or agents. *Eagle & Phoenix Mills v. Herron*, 119 Ga. 389, 46 S. E. 405.

152. *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514. Where negligence of servants while running trains is alleged, the complaint need not allege the particular servant or servants whose negligence caused the injury. *Rinard v. Omaha, K. C. & E. R. Co.*, 164 Mo. 270, 64 S. W. 124.

153. *Brown v. Central Pac. R. Co.*, 68 Cal. 171, 7 Pac. 447; *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337; *Libby v. McNeill & Libby v. Scherman*, 146 Ill.

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540, 34 N. E. 801, 37 Am. St. Rep. 191; *Chicago, I. & L. R. Co. v. Barnes*, — Ind. —, 68 N. E. 166; *Ohio & M. R. Co. v. Collam*, 73 Ind. 261, 38 Am. Rep. 134; *Larson v. St. Paul, M. & M. R. Co.*, 34 Minn. 477, 26 N. W. 604; *Fraser v. Red River Lumber Co.*, 42 Minn. 520, 44 N. W. 878; *Fifield v. Northern R. R.*, 42 N. H. 225; *Minter v. Union Pac. R. Co.*, 3 Utah, 500, 24 Pac. 911; *Hulehan v. Green Bay, W. & St. P. R. Co.*, 58 Wis. 319, 17 N. W. 17; *Lessard v. Northern Pac. R. Co.*, 81 Wis. 189, 51 N. W. 321; *Hermann v. Port Blakely Mill Co.*, 69 Fed. 646.

154. *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328 [followed in *Fortin v. Manville Co.*, 128 Fed. 642]. See also *Berard v. Smith*, 29 R. I. 528, *Marker v. City of Mishawaka*, 35 Ind. App. 293, 74 N. E. 19.

complaint properly alleges the negligence as that of the employer, and the question of fellow-servants cannot be raised by demurrer; but if the act or omission relied on is not one relating to a non-delegable duty it is necessary to allege what servant was negligent, to escape a demurrer.

If the rule of fellow-servants in the particular case has not been abolished by statute, a complaint against a corporation which fails to show what servant was negligent has been held insufficient in the federal courts on the theory that the negligence may have been that of a fellow-servant;<sup>155</sup> but if the defense of fellow-servants is not available because abolished by statute, the complaint need not, in most jurisdictions, allege the particular servant or servants claimed to have been negligent, at least unless a motion is made to make the complaint more definite and certain or for a bill of particulars.

In Kansas, however, a complaint alleging negligence on the part of defendant's servants must state which servant was negligent as well as what acts or omissions constituted the negligence.<sup>156</sup>

#### **Stating name of negligent employee.**

Generally it is not necessary to state the name of the negligent servant.<sup>157</sup>

Thus, in Georgia, it is held that the mere failure to give the name of the person alleged to be the negligent foreman is not of itself ground for demurrer; but that the failure both to state the name and to set forth what duties or services his position required of him, so as to show whether he was acting as a vice-principal or a fellow-servant, makes the petition subject to special demurrer.<sup>158</sup>

So in Texas, the complaint need not state the name of

155. *Brown v. Pennsylvania R. Co.*, 142 Fed. 909.

156. *Atchison, T. & S. F. R. Co. v. O'Neill*, 49 Kan. 367, 30 Pac. 470.

157. Under statutes, see *infra*, § 843.

158. *General Supply & Construction Co. v. Lawton*, 131 Ga. 375, 62 S. E. 293.

the negligent foreman who is claimed to be a vice-principal.<sup>159</sup>

Where no statute governs the case, and the negligence alleged is that of a co-servant who is a superior servant because of his rank, and in the particular jurisdiction such a servant is not a fellow-servant of an inferior one such as plaintiff, it is not necessary to allege the name of the superior servant, where it was alleged he was a foreman, and the time, place and group of men over whom he was foreman is stated.<sup>160</sup>

Under some of the statutes, however, it is held that the name of the negligent servant must be stated.<sup>161</sup>

**Alleging negligent servant was acting within scope of employment.**

Where the negligence of a co-servant is relied on it must be alleged or shown that his act or omission was done in the line of his duty;<sup>162</sup> but where the law presumes the negligent servant was acting within the scope of his employment, from the other facts alleged, it is unnecessary to expressly allege such fact.<sup>163</sup>

In pleading the authority of the negligent servant, it has been held not necessary to set out the contract between him and defendant, nor to state a conclusion as to the extent of the authority of such foreman or the scope of his employment.<sup>164</sup>

159. *Suderman & Dolson v. Kriger*, 50 Tex. Civ. App. 29, 109 S. W. 373.

160. *Suderman & Dolson v. Kriger*, 50 Tex. Civ. App. 29, 109 S. W. 373.

161. See *infra*, § 843.

162. *Louisville & N. R. Co. v. Gillen*, 166 Ind. 321, 78 N. E. 1058. Where the act of a servant is relied on to show negligence of the master, the complaint should clearly show, by express allegation or necessary inference, that such act was within the scope of the employment of the offending servant. *Holliday &*

*Wyon Co. v. O'Donnell*, 44 Ind. App. 647, 90 N. E. 24.

163. *Alabama Great Southern R. v. Brock*, 161 Ala. 351.

164. *American Car & Foundry Co. v. Hill*, 226 Ill. 227, 80 N. E. 784, in which case the following allegation was held sufficient: "And plaintiff avers that on the date aforesaid he was a servant of the defendant, and as such servant was directed by the defendant's foreman, George Howard, to take a wheelbarrow and remove from said shed certain debris which had been torn down."



### **Alleging negligence as proximate cause of injury.**

The complaint must show that the negligence complained of was the proximate cause of the accident.<sup>165</sup>

To show that the negligence alleged was the cause of the injury, it is not sufficient to merely allege a conclusion to that effect, where not warranted by the facts.<sup>166</sup>

Generally there is no express averment that the negligence complained of was the proximate cause of the injury, and no such allegation is necessary if the facts themselves as set forth in the complaint show the causal connection between the two.

The complaint need not state in so many words that the injury was due to the negligence of defendant but it is sufficient if the alleged acts of negligence are set out with sufficient fullness and clearness to enable defendant to understand the case made, and to know what he is to meet.<sup>167</sup>

In Alabama, it is held that the complaint must allege that the negligence set forth was the proximate cause of the injury unless the facts and circumstances pleaded lead to that conclusion with reasonable certainty.<sup>168</sup>

165. *Ritch v. Kilby Frog & Switch Co.*, 164 Ala. 131; *Moseley v. J. S. Schofield Sons Co.*, 123 Ga. 197, 51 S. E. 309; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 373, 74 N. E. 282; *Gulf, C. & S. F. R. Co. v. Renfro* (Tex. Civ. App.), 569 S. W. 648. Sufficiency of allegations, see *Sloss-Sheffield, Steel & Iron Co. v. Mobley*, 139 Ala. 425, 36 So. 181; *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243, 73 N. E. 373; *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345; *Clear Creek Stone Co. v.*

*Dearmin*, 160 Ind. 162, 60 N. E. 609; *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Ia. 747, 106 N. W. 177; *Deremer v. Delaware, L. & W. R. Co.*, 47 N. J. L. 407, 24 Atl. 481; *Missouri, K. & T. R. Co. v. Hanson* (Tex. Civ. App.), 590 S. W. 1122; *Duigee v. Unrie's Adm'x*, 98 Va. 247, 35 S. E. 794.

166. *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760.

167. *Seal v. Virginia Portland Cement Co.*, 108 Va. 806, 62 S. E. 795.

168. *Merriweather v. Sayre Mining Co.*, 161 Ala. 441, 49 So. 916.



### § 829. Alleging knowledge on part of defendant.

There is a conflict of opinion as to the necessity of alleging knowledge on the part of defendant of the unsafe place, appliances or conditions. In some jurisdictions it is held that the complaint is insufficient unless it alleges knowledge or means of knowledge on the part of defendant,<sup>169</sup> except where the facts alleged are such as to necessarily raise a presumption of knowledge.<sup>170</sup>

On the other hand, it is held in some states that a general allegation of negligence or of facts which *prima facie* show negligence is sufficient without specifically averring want of notice of the defect on the part of defendant.<sup>171</sup>

169. *Worden v. Gore-Meehan Co.*, — Conn. —, 78 Atl. 422; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Ryland v. Atlantic Coast Line R. Co.*, 57 Fla. 143, 49 So. 745; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Chamberlain v. Waymire*, 32 Ind. App. 442, 68 N. E. 306; *Charleston & W. C. R. Co. v. Miller*, 113 Ga. 15, 38 S. E. 338; *Carruthers v. Chicago, R. I. & P. Co.*, 55 Kan. 600, 40 Pac. 915; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Grover v. New York, S. & W. R. Co.*, 76 N. J. L. 237, 69 Atl. 1082; *McMillan v. Saratoga & Washington R. Co.*, 20 Barb. (N. Y.) 449; *Norfolk & W. R. Co. v. Jackson's Adm'r*, 85 Va. 489, 8 S. E. 370 [followed in *Washington, A. & Mt. V. R. Co. v. Taylor*, 109 Va. 737, 64 S. E. 975]. See also *Summerhays v. Kansas P. R. Co.*, 2 Colo. 484 (knowledge of incompetency of servant must be alleged); *Southern Bell T. & T. Co.*, 122 Ga. 602, 50 S. E. 343; *Johnston v.*

*Enterprise Mfg. Co.*, 130 Ga. 143, 60 S. E. 449; *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S. E. 438; *Hencke v. Ellis*, 110 Wis. 532. In Montana, where it appears from the complaint that the defect is one of construction, an allegation of the employer's knowledge of the defect is not required. *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142. But see *Fearon v. Cummins*, 35 Mont. 232, 88 Pac. 794.

There are earlier cases in Indiana holding the contrary but the law as laid down by the later cases cited above clearly fix the position of the Indiana court.

170. *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15; *Louisville, E. & St. L. C. R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43; *Warner v. Western North Carolina R. Co.*, 94 N. C. 250.

171. *O'Connor v. Illinois C. R. Co.*, 83 Ia. 105, 48 N. W. 1002; *Wilson v. Alpine Coal Co.*, 118 Ky. 463, 81 S. W. 278; *Branch v. Port Royal & W. C. R. Co.*, 35 S. C. 405,

It is much the better practice, however, without regard to what the law is in the particular state, to specifically aver that defendant knew of the defect and danger.

### Sufficiency of allegations.

The complaint need not allege, in the exact terms, that the master knew, or, in the exercise of ordinary care, should have known, of the defects.<sup>172</sup>

14 S. E. 808; *Morriss Bros. v. Bowers*, 105 Tenn. 59; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Sweeney v. Jessup & Moore Paper Co.*, 4 Pennw. (Del.) 284, 54 Atl. 954; *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462, 54 Neb. 127, 74 N. W. 454.

IN MONTANA, the rule is laid down that knowledge by defendant is sufficiently averred by an allegation that defendant negligently permitted appliances to become defective and negligently suffered them to remain in a defective condition. *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142.

UNDER ILLINOIS MINING STATUTE, "wilfully" is synonymous with "knowingly." *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166.

IN MISSOURI the rule is now settled by *Clippard v. St. Louis Transit Co.*, 202 Mo. 432, 101 S. W. 44, which, after reviewing the earlier cases, held that an allegation that "plaintiff avers that the defendant was negligent in furnishing said car for said work in said defective condition" was sufficient as equivalent to an allegation of knowledge, although it is stated it "would have been much better to

have had the express averments" as to knowledge.

IN NEBRASKA, alleging that the master "unlawfully, wrongfully and negligently" directed his servant to work in a cave under circumstances detailed at length which plaintiff charged made the cave a place dangerous to work in, is sufficient as in effect charging knowledge. *Hankins v. Reimers*, 86 Neb. 307, 125 N. W. 516. What the law is in Illinois is not clear. In *Chicago & E. I. R. Co.*, 132 Ill. 161, it was held not necessary to allege that defendant knew of defects in the construction of its tracks, switches, etc., where it was alleged that it "permitted" the condition complained of, on the theory that such allegation implied knowledge on the part of defendant. In *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376, 62 N. E. 822, alleging that defendant allowed a machine to become old and worn, and neglected to make proper inspections thereof, was held sufficient. In *Owens v. Lehigh Valley Coal Co.*, 115 Ill. App. 142, the allegation of knowledge is held unnecessary.

172. *Galveston, H. & S. A. R. Co. v. Udalle* (Tex. Civ. App.), 91 S. W. 330.

An allegation that the defect was known to the defendant includes constructive knowledge,<sup>173</sup> and under such an allegation evidence of constructive knowledge is admissible.<sup>174</sup>

Furthermore the exact time that defendant knew of the defect need not be alleged.<sup>175</sup>

Alleging constructive notice is sufficient without alleging actual knowledge.<sup>176</sup>

Where the preliminary facts are set forth in detail, the mere allegation that defendant knew "or ought to have known" of the defect is not objectionable as a statement of a legal conclusion;<sup>177</sup> and it is not necessary to allege the facts showing how defendant knew.<sup>178</sup>

In Rhode Island, the court goes to the extreme in holding that an allegation that defendant knew or was bound to know of the existence of a defect is bad, and that the allegation should be that the defects were known or would have been known but for the want of reasonable care.<sup>179</sup>

### § 830. Alleging service of notice of injury.

Where service on the employer of a notice of the injury is required by statute or contract, the complaint must allege that notice was served.<sup>180</sup>

173. *Louisville, E. & St. L. C. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116.

174. *Currelli v. Jackson*, 77 Conn. 115, 58 Atl. 762; *Blazenic v. Iowa & W. Coal Co.*, 102 Ia. 706, 72 N. W. 292.

175. *Wabash W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661; *Oolitic Stone Co. v. Ridge*, — Ind. —, 91 N. E. 944.

176. *Noyes v. Smith*, 28 Vt. 59.

177. *Southern States Cement Co. v. Helms*, 2 Ga. App. 308, 314, 58 S. E. 524; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289. But where the duty of

knowing does not arise as a matter of law from the facts already stated, then the specific circumstances creating the duty of knowing must be detailed. *Id.*

178. *Consolidated Coal Co. v. Schreiber*, 65 Ill. App. 304; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79.

179. *Cox v. Providence Gas Co.*, 17 R. I. 199, 21 Atl. 344.

180. *Mathieson v. St. Louis & S. F. R. Co.*, 219 Mo. 542, 118 S. W. 9; *Rogers v. Portland Lumber Co.*, 54 Or. 387, 102 Pac. 601, 103 Pac. 514; *Ginricevic v. Tacoma*, 57 Wash. 329, 106 Pac.

However, where there is no statute or contract provision requiring a notice, the giving of notice need not be alleged; and where the statute does not require notice in actions based on the common law, a complaint stating a good cause of action under the common law, although it attempts to set up a cause of action under a statute, is sufficient without alleging that notice was given.<sup>181</sup>

In stating that notice was given, it is the better practice to allege the time when it was given, but it is held unnecessary to so state in Massachusetts.<sup>182</sup>

### § 831. Negating defenses in general.

It is a general rule that the complaint need not anticipate a defense and negative it. In the application of this rule to the law of master and servant more or less conflict as between the different jurisdictions has arisen, based on divergent views as to what constitutes a part of plaintiff's cause of action and what is not a part thereof but is a defense. In most of the states it is not necessary in the complaint to negative contributory negligence or assumption of risk and it is submitted that this is the better rule, and the tendency of the later judicial decisions and legislative enactments is in that direction. Of course if the statement of facts in the complaint necessarily tends to show assumption of risk, or contributory negligence, or that the negligence of a fellow-servant was the efficient cause of the injury for which the master is not liable, then it should be, and is, necessary, in all jurisdictions, for plaintiff to allege further facts tending to show that the defense is in reality unavailable.

As in other actions, the complaint need not negative a proviso in the statute.<sup>183</sup>

908; *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. Supp. 705; *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203; *Crosby v. Lehigh Valley R. Co.*, 128 Fed. 193, based on New York statute.

181. *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411. Allegation that notice was given

will be treated as surplusage in action based on common law. *Young v. Missouri, K. & T. R. Co.*, 82 Kan. 332, 108 Pac. 99.

182. *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137.

183. *Blankenship v. Ethel Coal Co.*, — W. Va. —, 70 S. E. 862.

### § 832. Negating assumption of risk.

In Alabama,<sup>184</sup> Arkansas, California, Colorado, Delaware, Iowa, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Jersey, New York, North Carolina, Oregon, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin, and in the federal courts, the complaint need not negative the assumption of risk by alleging a lack of knowledge of the defect complained of, or otherwise.<sup>185</sup>

On the other hand, in Connecticut,<sup>186</sup> Georgia, Illinois,<sup>187</sup> Indiana, Maine, Ohio, Rhode Island and Vermont,<sup>188</sup> the complaint must negative the assumption of the risk, in a case where assumption of risk may be interposed as a defense, but of course need not negative the defense where it cannot be interposed, as where, in some states, the negligence consists in the employer's violation of a statute enacted for the protection of employees.<sup>189</sup>

In Indiana, it is held that the complaint need not, however, negative knowledge which the law imputes by reason of a person contracting for and engaging in a particular service.<sup>190</sup>

In the states where it is necessary to negative assumption of risk, but not in other states, the complaint must

184. *Southern Car & Foundry Co., v. Jennings*, 137 Ala. 247, 34 So. 1002; *Broslin v. Kansas City, M. & B. R. Co.*, 114 Ala. 398, 21 So. 475.

185. See § 768, burden of proof. In Michigan it is held that the complaint need not negative plaintiff's knowledge of the danger if it avers that he was without fault. *Cristanelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910.

186. *Elie v. Cowles & Co.*, 82 Conn. 236.

187. *Chicago & A. R. Co. v. Bell*, 111 Ill. App. 280.

188. See burden of proof, § 768.

189. Even in those states where

assumption of risk must ordinarily be negated in the complaint, if assumption of risk is no defense in the particular action, as for instance in some states where the negligence consists in the violation of a statute passed for the protection of employees, it need not be negated in the complaint. Where a statute expressly precludes the defense of assumption of risk, the complaint need not negative the existence of such defense. *Republic Iron & Steel Co. v. Yanuska*, 166 Fed. 684.

190. *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158.

allege that plaintiff had no knowledge of the incompetency of the negligent fellow-servant, where the action is based on the negligence of the master in employing or retaining incompetent co-servants.<sup>191</sup>

A statute providing that want of contributory negligence need not be alleged does not affect the necessity of negating assumption of risk.<sup>192</sup>

### Sufficiency of allegations.

No particular phraseology is required in denying assumption of risk. The assumption of risk may be negated in general terms,<sup>193</sup> but if the facts are thereafter stated specifically in the complaint the specific allegations will control the general one,<sup>194</sup> and the complaint may be demurrable as showing an assumption of risk.<sup>195</sup>

Where the specific facts alleged show a knowledge of danger, or the same opportunities for knowledge as the master, these allegations will overcome a general allegation of want of knowledge.<sup>196</sup>

Assumption of risk is sufficiently negated by averments that plaintiff had no knowledge of the defect or danger,<sup>197</sup> but the allegation of want of knowledge must

191. *Indianapolis & G. R. T. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185. That express allegation is unnecessary, see *Mahoney's Adm'r v. Rutland R. Co.*, 81 Vt. 210, 69 Atl. 652.

192. *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158.

193. *Louisville, E. & St. L. C. R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43.

194. *Id.* See also *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15.

195. *Louisville & N. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214. In an action based on the common law, the employee must negative

his want of knowledge of the danger attending his use of a way on the master's premises. An allegation of want of knowledge is overcome by allegation of specific facts showing knowledge. *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

196. *Cleveland, C. C. & St. L. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

197. See *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79. The burden of showing absence of assumed risk

not be by way of recital.<sup>198</sup> It must be as broad as the allegation of knowledge on the part of the master, and disclose an absence of knowledge of the defects or omissions complained of.<sup>199</sup>

So the want of knowledge must be expressly, or by necessary inference, alleged to have existed at the time of the accident.<sup>200</sup>

It is not necessary to aver in the complaint facts showing affirmatively that the employee had no means of ascertaining the defect. It is sufficient to aver he had no knowledge of such defect.<sup>201</sup>

So it is not necessary to allege that plaintiff did not have equal opportunity with defendant to know of the defect or danger.<sup>202</sup>

being upon the plaintiff in Indiana, a complaint is defective which does not allege, where safety of appliances or premises or incompetency of servants is involved, ignorance thereof on the part of the employee. If the defect is in a platform he must allege its necessity. *Peterson v. New Pittsburg Coal & Coke Co.*, 149 Ind. 260, 49 N. E. 8. Assumption of risk is negatived by averments showing that plaintiff had no knowledge of the danger, or no knowledge of facts and circumstances which, if he had known, would have apprised him of the peril. *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158.

198. *Holliday & Wyon Co. v. O'Donnell*, 44 Ind. App. 647, 90 N. E. 24; *Cleveland, C. C. & St. L. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932.

199. *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

200. *Ames v. Lake Shore & M. S. R. Co.*, 135 Ind. 363, 35 N. E. 117.

201. *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Baltimore & O. S. W. R. Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530; *Ohio & Miss. R. Co. v. Percy*, Admx., 128 Ind. 197, 27 N. E. 479; *Louisville & N. R. Co. v. Carter (Ky.)*, 112 S. W. 904; *Peter & Melcher Steam Stone-works v. Green*, 25 Ky. L. Rep. 946, 76 S. W. 844; *Ross-Paris Co. v. Brown* 121 Ky. 821, 28 Ky. L. Rep. 813, 90 S. W. 568; *Contra, Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133; *Gould v. Aurora, E. & C. R. Co.*, 141 Ill. App. 344. If, however, it is averred he could not have learned of it by the exercise of ordinary care, this must be proved. *Chicago, I. & L. R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244.

202. *Louisville, N. A. & C. R. Co. v. Breedlove*, 10 Ind. App. 657, 38 N. E. 357. Where the defect complained of was a guy rope it was said "it was not necessary for him (the servant) to show in his pleadings that he had inspected the



The general allegation of want of knowledge of the defect by plaintiff covers both actual and imputed knowledge.<sup>203</sup>

An averment that the plaintiff was free from fault does not take the place of averments showing that the risk was not voluntarily assumed.<sup>204</sup>

In Georgia, it is held that freedom from "implied" knowledge can be alleged in the form of a legal conclusion only when the facts set forth show such a state of circumstances as to relieve the plaintiff from such an imputation.<sup>205</sup>

rope or that he had not had opportunity to inspect it, or that he could not have learned of its defective condition by the exercise of ordinary care and diligence." Consolidated Stone Co. v. Williams, 26 Ind. App. 131, 57 N. E. 558. An averment in a complaint that an employee engaged in pushing a hand car loaded with limestone to a kiln did not know and could not have discovered without a special examination that the platform was decayed, the track and rails were worn and rusty and rotten so that they would spread, etc., negatived knowledge and an assumption of the risk. The averment seems to have overcome every reasonable presumption. Salem-Bedford Stone Co. v. Hilt, 26 Ind. App. 543, 59 N. E. 97.

203. Consolidated Stone Co. v. Summit, 152 Ind. 297, 53 N. E. 235; Pennsylvania Co. v. Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377. In Indiana an allegation of want of knowledge negatives imputed knowledge. Cleveland, C. C. & St. L. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158.

204. Louisville, N. A. & C. R. Co. v. Corps, 124 Ind. 427, 24 N. E. 1046; Indianapolis & G. R. T. Co. v. Foreman, 162 Ind. 85,

102 Am. St. Rep. 185; Chicago O. Coal & Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857; Hesse v. Columbus, S. & H. R. Co., 58 Ohio St. 167; Brainard v. Van Dyke, 71 Vt. 359. But see Henry v. Fitchburg R. Co., 65 Vt. 436, 26 Atl. 485; Cristanelli v. Saginaw Min. Co., 154 Mich. 423, 117 N. W. 910. An allegation that plaintiff was injured "without any fault or negligence on his part" does not take the place of an averment showing that the risk was not assumed. Cleveland, C. C. & St. L. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158.

205. Taylor v. Virginia-Carolina Chemical Co., 4 Ga. App. 705, 62 S. E. 470; Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 S. E. 289. If the plaintiff relies upon his tender years, his inexperience, a false sense of security occasioned by misrepresentations of the master, the latent character of the defect, or other reason regarded by the law as sufficient to relieve the servant from implication of knowledge, the facts should be definitely stated. Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 S. E. 289. As a nicety of pleading, it is better to



### Averment of promise to remedy defects.

In those states where assumption of risk must be negatived, and plaintiff had knowledge of the danger, but relied on a promise to remedy the defect, such promise must be pleaded;<sup>206</sup> and it should be alleged that plaintiff relied on the promise,<sup>207</sup> and that a reasonable time for remedying the defect had elapsed after the promise was made.<sup>208</sup>

But it is not necessary to also allege that the master's failure to remedy the defect was negligence.<sup>209</sup>

The complaint need not allege what particular officer or agent made the promise to remedy the defect.<sup>210</sup>

### Complaint showing assumption of risk on its face.

If the complaint shows on its face that plaintiff assumed the risk, it is demurrable,<sup>211</sup> provided assumption of risk is a defense which may be interposed in the particular case.

### § 833. Negating contributory negligence.

In a previous chapter, the question as to the burden of proof in connection with contributory negligence has been

allege the lack of actual knowledge directly, even though the proof be circumstantial." *Southern States Cement Co. v. Helms*, 2 Ga. App. 308, 58 S. E. 524.

206. *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844; *Elie v. C. Cowles & Co.*, 82 Conn. 236, 73 Atl. 258. Sufficiency of allegations as to promise to remedy defect, see *Romona Oolitic Stone Co. v. Phillips*, 11 Ind. App. 118, 39 N. E. 96; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806.

207. *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567.

208. *Id. Burns v. Windfall Mfg. Co.*, 146 Ind. 261, 45 N. E. 188. Contra, *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844.

209. *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161.

210. *Burch v. Southern Pac. Co.*, 140 Fed 270.

211. *Bolden v. Central of Ga. R. Co.*, 130 Ga. 456, 60 S. E. 1047; *Dozier v. Atlanta*, 118 Ga. 354, 45 S. E. 306; *Hoover v. Empire Coal Co.*, 149 Ill. App. 258; *Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Walker v. Wehking*, 29 Ind. App. 62, 63 N. E. 128; *Klutts v. Gibson Bros.*, 37 Tex. Civ. App. 216, 83 S. W. 404; *Smith v. Armour & Co.*, 37 Tex. Civ. App. 633, 84 S. W. 675.

considered,<sup>212</sup> and it has been seen that, although the law is not the same in all the states, that in great majority contributory negligence is an affirmative defense which must be pleaded and proved by defendant. And in some states, including Indiana and New York, where the burden formerly rested on plaintiff, the rule has been changed by a statute making such negligence an affirmative defense which must be pleaded and proved by defendant.<sup>213</sup>

In Illinois, Louisiana, Maine, Massachusetts, and Michigan, the plaintiff must still show in his complaint that he was not negligent;<sup>214</sup> and in Iowa, Kentucky, Maryland, and Ohio, there are cases so holding although it is somewhat doubtful if the rule prevails in all of such jurisdictions. In some of the other states the question does not seem to have been decided, but in most of the states the courts have expressly held that contributory negligence need not be negatived in the complaint.

In Georgia, where the cases are differentiated according to whether defendant is a railroad company or not, the decisions are to some extent conflicting and it is therefore safer in all cases to aver in the petition that plaintiff was acting with due care, and to allege in railroad cases that he was "free from fault."<sup>215</sup>

In Connecticut, where there has been some diversity of opinion as to the burden of proof of contributory negli-

212. See *supra*, § 769.

213. See *supra*, § 769. Under the 1899 statute in Indiana, it is expressly provided that plaintiff need not allege the want of contributory negligence, and also that the defense may be proved under the answer of general denial. *Burn's Ann. St.* 1908, § 362. Section 7083 et seq., *Burns Ann. St.* 1901, was held to be modified by Acts of 1899, p. 58 (*Burns Ann. St.* 1901, sec. 359a), so that a complaint for personal injuries under

the former act need not allege that plaintiff was in the exercise of due care at the time of the injury. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218.

214. See *supra*, § 769.

215. *Central of Ga. R. Co. v. Ruff*, 127 Ga. 200, 56 S. E. 290. holding that an employee cannot recover against a railroad company unless he alleges that he was free from fault and that the defendant was negligent.

gence, it has been recently held that plaintiff need not negative his own negligence in the complaint.<sup>216</sup>

### Knowledge or means of knowledge.

The question of negating knowledge or means of knowledge of the danger properly belongs under the head of negating assumed risk and it has been so treated in this work notwithstanding the courts in some instances refer to such knowledge or means of knowledge as contributory negligence rather than assumption of risk.<sup>217</sup>

### Sufficiency of allegations.

It is sufficient to allege the facts showing that the injured servant was in the exercise of due care at the time of his injury, without alleging any conclusions.<sup>218</sup>

On the other hand, it is generally held sufficient to allege the mere conclusion that plaintiff was in the exercise of due care, or its equivalent, without stating facts to negative contributory negligence.<sup>219</sup>

Where it is necessary to negative contributory negligence, plaintiff need not minutely and in detail describe every fact and circumstance in the case which would tend to show the want of negligence on the part of the injured servant.<sup>220</sup>

216. *Simeoli v. Derby Rubber Co.*, 81 Conn. 423, 71 Atl. 546.

217. See *supra*, § 832.

218. *Republic Iron & Steel Co. v. Walsh*, 32 Ky. L. Rep. 420, 105 S. W. 974.

219. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479, 63 N. E. 239, (allegation that injury was caused without fault or negligence on the part of plaintiff); *Pope v. Great Northern R. Co.*, 94 Minn. 429, 103 N. W. 331; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676; *Pennsylvania R. Co. v. O'-*

*Shaughnessy*, 122 Ind. 588, 23 N. E. 675. But see *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514, 27 Atl. 328. In Georgia, in an action against a railroad company, plaintiff must allege that he was free from fault, although it is not necessary that the precise phrase should be used, provided such condition of affairs is apparent from the language used. *Central of Ga. R. Co. v. Ruff*, 127 Ga. 200.

220. *Central R. Co. v. Hubbard*, 86 Ga. 632, 12 S. E. 1020.

The phrase "without fault" has been held to sufficiently negative negligence,<sup>221</sup> as has the allegation that plaintiff was in "the usual and ordinary course of his employment."<sup>222</sup>

But an allegation that plaintiff was injured while fulfilling his duty has been held not equivalent to an allegation that he was in the exercise of due care.<sup>223</sup>

The complaint must show that plaintiff's freedom from fault extended, in point of time, up to the injury.<sup>224</sup>

The mere fact that plaintiff alleges in his complaint that he was in the exercise of due care does not render it safe from a demurrer where such averment is clearly inconsistent with other allegations contained in the declaration.<sup>225</sup>

On the other hand, unless the facts alleged in the complaint show clearly that plaintiff was negligent, the allegation of the exercise of due care will render the complaint good as against a demurrer.<sup>226</sup>

#### § 834. Negating negligence of fellow-servants.

If the complaint seeks to recover for an injury alleged to have been caused by the negligence of the master, it need not affirmatively aver that the injury was not caused by the negligence of fellow-servants.<sup>227</sup>

221. *Rogers v. Overton*, 87 Ind. 410; *Louisville E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714.

222. *Lake Shore & M. S. R. Co. v. Conway*, 67 Ill. App. 155 (affirmed in 169 Ill. 505, 48 N. E. 483). It is submitted, however, that this case should not be followed.

223. *Kilberg v. Berry*, 166 Mass. 488, 44 N. E. 603.

224. *Lafayette Carpet Co. v. Stafford*, 25 Ind. App. 187, 57 N. E. 944.

225. *Russell v. Riverside Worsted Mills*, 24 R. I. 591, 54 Atl. 375. *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 50 Atl.

841. *Donahue v. Lonsdale Co.*, 25 R. I. 187, 55 Atl. 326.

226. *D. H. Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Blackstone v. Central of Ga. R. Co.*, 105 Ga. 380, 31 S. E. 90; *Hancock v. Keene*, 5 Ind. App. 408, 32 N. E. 329; *Snowberg v. Nelson-Spencer Paper Co.*, 43 Minn. 532, 45 N. W. 1131.

227. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540; *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743; *Louisville E. & St. L. C. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *Braun v. Conrad Seipp Brewing Co.*, 72 Ill. App. 232. See

On the other hand, where the complaint shows that the injury was caused by another servant, it is necessary in most jurisdictions to allege that the latter was not a fellow-servant,<sup>228</sup> although even in such states an express allegation to that effect has been held unnecessary, where the facts showing their relation are alleged.<sup>229</sup>

If the injury, as alleged in the complaint, is thereby shown to be the result of the negligence of a co-servant so that the action would be barred by the defense of fellow-servants in the absence of special circumstances, it is necessary to state facts to show that the negligent servant comes within the provisions of some statute abolishing such defense in his case, or, independent of statute, was not a

also *Cribben v. Callaghan*, 156 Ill. 549, 41 N. E. 178; *Brennan v. Berlin Iron Bridge Co.*, 72 Conn. 386, 44 Atl. 727; *Shaw v. Feltman* 121 App. Div. 597, 106 N. Y. Supp. 1043.

228. *Roberts & Schaeffer Co. v. Jones*, 82 Ark. 188, 101 S. W. 165; *Bennett v. Chicago City R. Co.*, 243 Ill. 420, 434 (not ground, however, for arresting judgment after verdict); *Schillinger Bros. Co. v. Smith*, 225 Ill. 74; *Farber v. St. Louis National Stock Yards*, 152 Ill. App. 589; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Weaver v. W. L. Goulden Logging Co.*, 116 La. 468, 40 So. 798; *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *Slattery's Admr. v. Toledo & W. R. Co.*, 23 Ind. 81; *Hagens v. Cape Fear & Y. V. R. Co.*, 106 N. C. 537, 11 S. E. 590. See also *Choctaw, O & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661. Compare, *Young v. Shickle, H. & H. I. Co.*,

103 Mo. 324, 15 S. W. 771; *Duffy v. Kivilin*, 98 Ill. App. 483; *Mott v. Chicago & M. E. R. Co.*, 102 Ill. App. 412; *Dawson v. King* (Tex. Civ. App.), 121 S. W. 917. Allegation that negligent servant of express company was the "agent and manager of the said company's office" was held insufficient. *Dwyer v. American Exp. Co.*, 55 Wis. 453, 13 N. W. 471. Not necessary where negligent servant shown by allegations of complaint to be exercising non-delegable duties and therefore a vice-principal. *McInerney v. Western Packing & P. Co.*, 249 Ill. 240, 94 N. E. 519.

229. *Chicago & A. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916; *Louisville, E. & St. L. C. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534; *Hathaway v. City of Des Moines*, 97 Ia. 333, 66 N. W. 188. In Massachusetts, where negligence of superintendent is relied on, declaration must allege the facts tending to show that plaintiff and the superintendent were not fellow-servants. *Flynn v. City of Salem*, 134 Mass. 351.

fellow-servant of the injured employee because (a) exercising non-delegable duties, (b) a superior servant, if such rule prevails in the state, or (c) engaged in a different department or not consociated, if that rule is in force.

For instance, in Kentucky, the complaint should aver that the employee whose negligence caused the injury was superior to the servant injured (that takes him out of the class of fellow-servants), having the right to direct and control his services, or facts should be stated from which this superior relation can plainly be inferred.<sup>230</sup>

In some states it is held insufficient to merely allege conclusions of fact to show the non-existence of the relation,<sup>231</sup> or the conclusion of law that the negligent servant at the time of the injury was the vice-principal of defendant.<sup>232</sup>

If, as matter of fact, the injured servant and the negligent servant are fellow-servants, and that is a defense, plaintiff, in order to state a cause of action, must allege that the master was guilty of negligence in selecting or retaining incompetent servants.<sup>233</sup>

If the complaint shows on its face that the proximate cause of the injury was the negligence of one who was a fellow-servant, it is demurrable.<sup>234</sup>

230. *Crane v. T. J. Congleton & Bro.* (Ky.), 116 S. W. 341.

231. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

232. *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413, 16 S. W. 409. Alleging that the negligent servant was a foreman and was a vice-principal is insufficient both because stating a conclusion rather than facts, and because not alleged that he was a vice-principal as to plaintiff where superiority in rank was relied on as constituting him a vice-principal. *Suderman &*

*Dolson v. Kriger*, 50 Tex. Civ. App. 29, 109 S. W. 373.

233. *Zier v. Chesapeake R. Co.*, 98 Md. 35, 56 Atl. 385.

234. *Whitfield v. Louisville & N. R. Co.*, 7 Ga. App. 268, 66 S. E. 973; *Turner v. Seville Gin & Warehouse Co.*, 127 Ga. 555, 56 S. E. 739; *Wilder v. Miller*, 128 Ga. 139, 57 S. E. 309; *State v. Chesapeake Beach R. Co.*, 98 Md. 35, 56 Atl. 385. Where the complaint alleges negligence on the part of a servant who is clearly a fellow-servant, it is demurrable. *Berard v. Smith*, 29 R. I. 528, 72 Atl. 705.

**§ 835. Alleging unsafe place to work.**

If the ground of negligence relied on is the failure to furnish a safe place to work, the complaint properly alleges the violation of such duty, followed by a specific statement of the facts to show the existence of the duty and wherein the place was unsafe, that defendant knew or should have known thereof,<sup>235</sup> that defendant was negligent in some particular respect in connection therewith, and that such negligence was the efficient cause of the injury.<sup>236</sup>

In alleging an unsafe place to work, the better practice is to first aver the existence of the duty and then allege that the employer failed to comply with such duty in that it negligently conducted the work, specifying the particulars showing the breach of the duty. But if the particular in which the place was unsafe is alleged, the evidence in support thereof need not be pleaded.<sup>237</sup>

If a defect in the floor of the place of work is relied on, it has been held that the complaint should state the character of the defect;<sup>238</sup> but where the breaking of a bridge was relied on as the negligence causing the injury, it was held that the nature of the defect in the bridge need not be specifically described.<sup>239</sup>

In Alabama, alleging that "defendant negligently failed to furnish plaintiff with a reasonably safe place to work" has been held sufficient as against the objection that it is not shown how or wherein defendant so failed.<sup>240</sup>

It is not fatal to fail to allege the place where the work was located, since it is a matter as much in the knowledge of defendant as of plaintiff.<sup>241</sup>

235. See *supra*, § 829.

236. See *Wild v. Oregon Short Line & U. N. R. Co.*, 21 Oreg. 159, 27 Pac. 954. It is not sufficient to allege that an electric light pole was "too near the track." *Blackstone v. Central of Ga. R. Co.*, 105 Ga. 380.

237. *Cristanelli v. Saginaw Mining Co.*, 154 Mich. 423, 446, 119 N. W. 910.

238. *Esslinger v. Boehm*, — N. J. L. —, 79 Atl. 267.

239. *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 So. 96.

240. *Gray Eagle Coal Co. v. Lewis*, 161 Ala. 415.

241. *City Council of Augusta v. Owens*, 111 Ga. 464, 36 S. E. 830.



It should be alleged that defendant failed to use reasonable care in furnishing a safe place to work rather than that he failed to furnish a reasonably safe place to work.<sup>242</sup>

However, alleging that defendant "negligently and wrongfully failed to provide a reasonably safe place to work" has been held a sufficient statement of failure to use ordinary care.<sup>243</sup>

### § 836. Alleging unsafe appliances.

Where unsafe tools, machinery or other appliances are the cause of the accident, the complaint properly alleges the duty of the master to use reasonable care to supply safe appliances,<sup>244</sup> and then should describe the appliance charged to be defective,<sup>245</sup> allege that it was furnished by defendant<sup>246</sup> and was defective,<sup>247</sup> set forth the defect in the appliance,<sup>248</sup> and allege or show that defend-

242. *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441.

243. *Trump v. Tidewater Coal & Coke Co.*, 46 W. Va. 238, 32 S. E. 1035.

244. But it is not ordinarily necessary to state this legal conclusion. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289.

245. More details are required when the instrumentality is not a simple and well known contrivance than when it consists of something that people generally, from their common knowledge, understand in detail without elaboration or description. However, it is not necessary to go into details of description, except so far as may be necessary to show the relation of the instrumentality to the duties of the servant, the specific mode of the injury, the exact nature of the defect, the negligence of the master, the lack of contributory negligence of the servant or some other es-

sentia element of the case. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289.

246. Where the furnishing of a defective appliance is relied on, it must be averred that the appliance was furnished or provided by the master and also connect the injury with the alleged defective condition. *Huyck v. McNerney*, 163 Ala. 244.

247. A direct averment is necessary. It must not be left to inference. *Hay v. Bash*, 37 Ind. App. 167, 76 N. E. 644.

248. *Walton v. Lindsay Lumber Co.*, 145 Ala. 661, 39 So. 670; *Anderson v. United States Rubber Co.*, 78 Conn. 48, 60 Atl. 1057; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289, holding also that it should appear, by facts stated and not conclusions, whether the defect was latent or patent. See also *Hix v. Belton Mills*, 69 S. C. 273, 48 S. E. 96. Where mere conclusion



ant was negligent either in originally furnishing the appliance, or in not inspecting and repairing it, and that such negligence was the cause of the injury, including a specific statement as to how the injury occurred.<sup>249</sup>

stated, remedy is not demurrer but motion to make more definite and certain. *Burton v. Anderson Phosphate & Oil Co.*, 75 S. C. 173, 55 S. E. 217. "Good pleading requires in such case a definite statement of the particular defect, so far as it may be practicable to state it, which caused the injury, to the end that defendant may know what claim he is to meet, and to which the evidence is to be directed. There may be cases of a complicated machine, where it may not be practicable or even possible to allege with certainty the identical defect causing the injury, but even in such case it may be stated in sufficiently specific terms to indicate to the defendant the charge he is called upon to meet,— or the difficulty may be obviated by several counts, with such variations as circumstances may require." *McGraw v. Great Northern Paper Co.*, 97 Me. 343, 54 Atl. 762. A defect in a machine may be described by showing that the machine was in such condition that it produced certain definitely described results which a machine not defective would not and should not produce. It is not necessary to describe minutely or particularly the physical appearance of the parts claimed to be defective. *Charleston & W. C. R. Co. v. Attaway*, 7 Ga. App. 231, 66 S. E. 548. Alleging that a switch lock was "old, worn out,

out of repair, broken and unsafe" is sufficient. *Ohio & M. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687. Where the alleged defect in a pulley was not an open and obvious one, it was sufficient to allege that it was wholly insufficient in both size and strength, which was known to defendant but was unknown to plaintiff who could not discover it. *Indiana Bituminous Coal Co. v. Buffey*, 28 Ind. App. 108, 62 N. E. 279.

IN RHODE ISLAND, however, alleging an appliance furnished was "unsafe, dangerous and wholly unfit," to the knowledge of the defendant, has been held sufficient without specifying the particular defect. *Berard v. Smith*, 29 R. I. 528, 72 Atl. 705.

SO, IN TEXAS AND SOME OTHER STATES, the particular defect in the appliance need not be alleged. *San Antonio & A. P. R. Co. v. Beauchamp* (Tex. Civ. App.), 116 S. W. 1163; *Galveston, H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Missouri, K. & T. R. Co. v. Barnes*, 42 Tex. Civ. App. 626, 95 S. W. 714; *Merritt v. American Woolen Co.*, 71 N. H. 493, 53 Atl. 303.

249. The complaint should show that the defect was such as would have been discovered by the master by a proper inspection. *Eagle & Phenix Mills v. Johnson*, 131 Ga. 44, 61 S. E. 990.

So, in most jurisdictions, it must be alleged or shown that the master had actual or constructive knowledge of the defect.<sup>250</sup>

And in some jurisdictions it may be necessary to negative the existence of contributory negligence,<sup>251</sup> or assumption of risk,<sup>252</sup> or both.

However, if the defects are unknown to plaintiff, of course he need not specify them.<sup>253</sup>

So where the defect is particularly described, the complaint need not allege whether the defect was in construction or arose from want of repair.<sup>254</sup>

Likewise, where failure to furnish suitable tools is relied upon, it is unnecessary to aver what the tools were.<sup>255</sup>

And where improper construction of the appliance is relied on, it has been held sufficient to merely allege that it was insufficiently, carelessly and negligently constructed, and of unfit material;<sup>256</sup> but it is insufficient to allege negligent construction merely by inference.<sup>257</sup>

It has been held not sufficient to merely allege failure to furnish safe and suitable machinery and appliances for performing a specified act.<sup>258</sup>

Where the complaint is otherwise sufficient, it is not vitiated by containing the erroneous statement of the law that it was the duty of the defendant to use the best, safest and strongest appliance available.<sup>259</sup>

250. See *supra*, § 829.

251. See *supra*, § 833.

252. See *supra*, § 832.

253. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661; *Cox v. Providence Gas Co.*, 17 R. I. 199, 21 Atl. 344; *Gulf, C. & S. F. R. Co. v. Hayden*, 29 Tex. Civ. App. 280, 68 S. W. 530.

254. *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392.

255. *Richmond Locomotive Works v. Ford*, 94 Va. 627.

256. *Preston v. St. Johnsbury & L. C. R. Co.*, 64 Vt. 280, 25 Atl. 486. See also *Carey v. Chicago & N. W. R. Co.*, 67 Wis. 208, 31 N. W. 163.

257. *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 753.

258. *De Luca v. Hughes*, 96 Fed. 923.

259. *Henne v. Steeb Shipping Co.*, 37 Wash. 331. But see *Norfolk & W. R. R. Co. v. Jackson's Admr.*, 85 Va. 489.

In Georgia, under the code, the petition need not directly allege that the machinery was not equal in kind to that in general use.<sup>260</sup>

If a defect in one thing is alleged and a defect in another part of the plant is proved, a recovery cannot be had without an amendment of the complaint.<sup>261</sup>

#### Under statutes.

Where the statute fixes the liability, the allegations of the complaint must correspond therewith.<sup>262</sup>

#### § 837. Failure to warn or instruct servant.

Where the negligence of the master relied on is the failure to warn or instruct the injured servant, the facts showing the existence of a duty to warn or instruct must be stated, it not being sufficient to merely allege the existence of the duty.<sup>263</sup>

260. *Southern States Cement Co. v. Helms*, 2 Ga. App. 308, 58 S. E. 524.

261. *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514.

262. See *infra*, § 843, defects in condition of ways, works, machinery, etc.

263. *Fortin v. Manville Co.*, 128 Fed. 642. But in Illinois it is held sufficient to allege failure to give warning that a car was about to strike the car on which plaintiff was working unloading cinders, and that such omission caused his injury, without alleging other facts to show the duty to give such warning. *Chicago & E. I. R. Co. v. Kimmel*, 221 Ill. 547, 77 N. E. 936. Complaints held sufficient, see *Alabama Mineral R. Co. v. Marcus*, 128 Ala. 355, 30 So. 679; *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691; *Seininski v. Wilmington Leather Co.* (Del.), 78 Atl. 296; *Anderson v. United States Rubber*

*Co.*, 78 Conn. 48, 60 Atl. 1057; *Milledgeville Oil Mills v. Wilkinson*, 134 Ga. 840, 68 S. E. 733; *Blout Carriage & Buggy Co. v. Ware*, 125 Ga. 571, 54 S. E. 637; *Danley v. Scanlon*, 116 Ind. 8, 17 N. E. 158; *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96, 75 N. E. 9; *Davis v. Queen City Furniture Mfg. Co.*, 116 La. 1070, 41 So. 318; *Schoner v. Allen*, 25 Okla. 22, 105 Pac. 191; *Gince v. Beland*, 25 R. I. 527, 57 Atl. 300; *Whitelaw v. Memphis & C. R. Co.*, 84 Tenn. 391, 1 S. W. 37; *Commerce Cotton Oil Co. v. Camp* (Tex. Civ. App.), 129 S. W. 852; *Greenville Oil & Cotton Co. v. Harkey*, 20 Tex. Civ. App. 225, 48 S. W. 1005; *Hillsboro Oil Co. v. White* (Tex. Civ. App.), 54 S. W. 432; *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. 272; *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465, 29 S. W. 252; *Chesapeake & O. R. Co. v. Melton*, 110 Va. 728,

But where the facts alleged show the duty, and that the injury resulted from a failure to perform such duty, it is not necessary to specifically aver the existence of such duty and the negligent failure to discharge it.<sup>264</sup>

The complaint must show a duty to warn,<sup>265</sup> and hence it must be shown that the injured servant, because of his youth or inexperience or other reason, did not know of the danger.

The complaint must negative knowledge of the danger by plaintiff.<sup>266</sup>

The complaint must allege or show that the master or his representatives knew, or should have known, of the ignorance of the danger on the part of the injured servant;<sup>267</sup> but in some states it has been held that an allegation that after a servant was directed to do more dangerous work defendant "wrongfully and negligently" failed to instruct plaintiff in the discharge of his duty, is sufficient.<sup>268</sup>

67 S. E. 346; *Coeur d'Alene Lumber Co. v. Goodwin*, 181 Fed. 949. Count for defective machinery is not inconsistent with count for failure to warn servant of danger of using it. *Ruddy v. George F. Blake Mfg. Co.*, 205 Mass. 172, 91 N. E. 310.

264. *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444, 31 So. 527.

265. *Lacy-Buek Iron Co. v. Holmes*, 146 Ala. 96; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843.

266. *Horan v. Gray & Dudley Hardware Co.*, 159 Ala. 159; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786; *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758. Alleging inexperience in the use of machinery is not equivalent to alleging inexperience in the use of the machine plaintiff was oper-

ating. *W. B. Conkey Co. v. Larsen*, 173 Ind. 585, 91 N. E. 163.

267. *Peterson v. New Pittsburgh Coal & Coke Co.*, 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277. If the complaint relies on the failure to warn as constituting negligence, it must allege that defendant or his representative knew of the danger and that plaintiff was inexperienced or in need of a warning. *Tennessee Coal, I. & R. R. Co. v. Williamson*, 164 Ala. 54. Where failure to warn a youthful employee is relied on, the master's knowledge of his inexperience must be alleged. *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588.

268. *Trump v. Tidewater Coal & Coke Co.*, 46 W. Va. 238, 32 S. E. 1035. An allegation that defendant negligently failed to warn

So the complaint must allege or show that defendant had, or should have had, knowledge of the danger;<sup>269</sup> but it need not allege knowledge on the part of defendant of the danger if the facts actually alleged show that he should have known thereof.<sup>270</sup>

The complaint must also allege or show that the failure to warn was the cause of the injuries.<sup>271</sup>

But failure to allege the particular danger to be apprehended, or the particular warning required, does not render the complaint insufficient, at least in the absence of a special demurrer for uncertainty.<sup>272</sup>

If the complaint does not allege facts showing a duty to warn and a breach thereof, a recovery cannot be had on that ground.<sup>273</sup>

#### § 838. Failure to make, promulgate or enforce rules.

If the negligence relied on is the failure of the master to make, promulgate or enforce suitable rules, the facts showing the breach of duty must be alleged, it not being sufficient to allege merely the legal conclusion.<sup>274</sup>

However, plaintiff need not allege exactly what rules should have been made.<sup>275</sup>

The allegations must be consistent with each other.<sup>276</sup>

plaintiff is an averment that defendant knew, or should have known, that plaintiff stood in need of warning. *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691.

269. *W. B. Conkey Co. v. Larsen*, 173 Ind. 585, 91 N. E. 163; *Johnston v. Enterprise Mfg. Co.*, 130 Ga. 143, 60 S. E. 449.

270. See *Robinson Min. Co. v. Tolbert*, 132 Ala. 462, 31 So. 519.

271. *Dickerson v. Eastern Kentucky L. Co.*, 133 Ky. 820, 119 S. W. 222, 121 S. W. 662; *Peerless Stone Co. v. Wray*, 10 Ind. App. 324, 37 N. E. 1058.

272. *Forquer v. North*, 42 Mont. 272, 112 Pac. 439.

273. *Fulwider v. Trenton Gas, L. & P. Co.*, 216 Mo. 582, 116 S. W. 508.

274. *Delaware, L. & W. R. Co. v. Voss*, 62 N. J. L. 59, 41 Atl. 224. Petition held to state cause of action, see *Reagan v. St. Louis, K. & N. R. Co.*, 93 Mo. 348. Complaint and answer held to raise issue as to promulgation of rule. *Lindsay v. Grand Ronde Lumber Co.*, 48 Or. 430, 87 Pac. 145.

275. *Texas & P. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493, 40 S. W. 546.

276. *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. 38.

If the negligence alleged consists in the violation of one of defendant's rules, the precise language of the rule need not be set forth.<sup>277</sup>

**§ 839. Alleging employment or retention of incompetent servant.**

If the negligent servant is a fellow-servant of the injured servant so as to ordinarily bar a recovery, one way in which plaintiff can recover, in a proper case, is to allege that the master was negligent in employing or retaining such servant and that he was incompetent.<sup>278</sup>

If not so pleaded, plaintiff cannot recover on this ground.<sup>279</sup>

The complaint must allege or show the following:<sup>280</sup>

(1) that the negligent servant was incompetent;<sup>281</sup> (2)

277. *Galveston, H. & S. A. R. Co. v. Karrer* (Tex. Civ. App.), 70 S. W. 328.

278. Substantive law, see vol. 1, §§ —.

279. *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Smith v. Bibb Mfg. Co.*, 112 Ga. 680, 37 S. E. 861; *Troughear v. Lower Vein Coal Co.*, 62 Ia. 576, 17 N. W. 775; *Elwell v. Hacker*, 80 Me. 416, 30 Atl. 64; *Lawler v. Androscoggin R. Co.*, 62 Me. 463, 16 Am. Rep. 492.

280. See *Conrad v. Gray*, 109 Ala. 130, 19 So. 398; *Van Dyke v. Menlo Fruit Co.*, 129 Ga. 532, 59 S. E. 215; *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53, 19 S. E. 21; *Kerlin v. Chicago, P. & St. L. R. Co.*, 50 Fed. 185; *Hall v. Bedford Quarries Co.*, 156 Ind. 460, 60 N. E. 149; *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246. Compare *Dossett v. St. Paul & Ta-*

*coma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Blake & Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297. Forms of complaints set out in case and held sufficient where negligence alleged was employment of incompetent fellow-servants, see *Pennsylvania Coal Co. v. Bowen*, 159 Ala. 165, 166, 49 So. 305; *Peter v. Middlesex & S. Traction Co.*, 69 N. J. L. 456, 55 Atl. 35.

281. Alleging that superior servant was advised that injured servant was habitually negligent and of general bad habits is not equivalent to alleging incompetency. *Kidwell v. Houston & G. N. R. Co.*, Fed. Cas. No. 7757. Alleging that he was "negligent and careless" is not equivalent to alleging that he was "incompetent." *Kelly v. Cable Co.*, 13 Mont. 411, 34 Pac. 611. Allegations held sufficient, see *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841.

that the master knew, or should have known, of such incompetency;<sup>282</sup> and (3) that the incompetency of such servant was the cause of the injury.<sup>283</sup>

Alleging that plaintiff did not know of the incompetency of the negligent servant is necessary only in those states where the complaint must negative assumption of risk.<sup>284</sup>

On the other hand, the complaint need not state the names and positions of the officers of the corporation alleged to have knowledge of the incompetency,<sup>285</sup> nor need it aver that it was a part of the duties of such fellow-servant to be skillful at the work for which he was employed.<sup>286</sup>

So it need not set out the particulars of the servant's incompetency,<sup>287</sup> nor state the exact time the master knew of such incompetency.<sup>288</sup>

But the mere conclusion that plaintiff's injuries resulted from the employment of incompetent servants is not a sufficient allegation.<sup>289</sup>

282. *Bell v. Globe Lumber Co.*, 107 La. 725, 31 So. 994; *Harris v. Balfour Quarry Co.*, 131 N. C. 553, 42 S. E. 973. But see *Flynn v. International Power Co.*, 24 R. I. 291, 52 Atl. 1089. In Texas it has been held that an allegation that the act of employing a servant was done in a careless and negligent manner, and that in consequence thereof an incompetent servant was taken into the master's service, is sufficient without expressly alleging that defendant knew, or could have known, of the incompetency. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 968.

283. *Crane v. T. J. Congleton & Bro. (Ky.)*, 116 S. W. 341. See *Kasadarian v. James Hill Mfg. Co.*, 130 Fed. 62; *Fitts v. Waldeck*, 51

Wis. 567, 8 N. W. 363. Complaint held to sufficiently show incompetency was cause of injury, see *Railroad Supply Co. v. Klofski*, 138 Ill. App. 468; *Galveston, H. & S. A. R. Co. v. Eckels*, 7 Tex. Civ. App. 429, 26 S. W. 1117.

284. See *supra*, § 832.

285. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

286. *Indianapolis Frog & Switch Co. v. Boyle*, 18 Ind. App. 169, 47 N. E. 690.

287. *Johnston v. Canadian Pacific R. Co.*, 50 Fed. 886.

288. *Wabash W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661.

289. *Sloss-Sheffield Iron Co. v. Smith*, 166 Ala. 437.



While the complaint must allege that the master knew of the incompetency, or by the exercise of reasonable care could have known, it is not necessary that these exact words should be used.<sup>290</sup>

Of course, if the negligent servant is a vice-principal, it need not be alleged that he was "incompetent" or that his incompetency was known to the master.<sup>291</sup>

An averment that the defendant failed to exercise ordinary care in the selection of its servants is the proper form of allegation rather than failure to select competent servants.<sup>292</sup>

#### § 840. Insufficient number of servants.

Where the negligence relied on is the failure of defendant to provide a sufficient number of servants to do the work with safety, the complaint must allege the facts showing the nature of the work plaintiff was engaged in, the failure to provide a sufficient number of co-servants, the injury as resulting from such failure, and the nature of the injury.<sup>293</sup>

The complaint must charge a breach of the duty;<sup>294</sup> but it is sufficient to allege the negligent acts relied on

290. *Pennsylvania Coal Co. v. Bowen*, 159 Ala. 165.

291. *Harris v. Quarry Co.*, 137 N. C. 204, 49 S. E. 95.

292. *Moss v. Pacific R. R.*, 49 Mo. 167, 8 Am. Rep. 126.

293. In *Alabama Great So. R. Co. v. Vail*, 142 Ala. 134, 38 So. 124, 110 Am. St. Rep. 23, the count demurred to, set forth in the statement of facts, while very general, was held not subject to demurrer, although it is doubtful if it would be deemed sufficient in other states, inasmuch as it failed to allege or show what number of men defendant furnished for the job, and also what number of men it was necessary to furnish to do the job without

injury. In *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392, the substance of the declaration is set forth at considerable length and it was held to state a cause of action. In that case it was alleged that "said carpenter and plaintiff and one additional person were not a sufficient number of persons to move said timber properly and with safety to plaintiff." In *Harper v. Norfolk & W. R. Co.*, 36 Fed. 102, a mere general conclusion seems to have been held to be sufficient.

294. See *Cristanelli v. Saginaw Mining Co.*, 154 Mich. 423, 437, 117 N. W. 910, where breach is set out at some length.



and the result, without stating the evidence relied on to sustain the allegations.<sup>295</sup>

**§ 841. Employment of infants.**

In some cases it is negligence to employ one of tender years, irrespective of statute and notwithstanding he has been properly warned, as where he is incapable of appreciating the risk and danger even after being properly instructed and warned. In such a case, the complaint should set forth the facts showing the nature of the work plaintiff was employed to do, his age and inexperience, and the instructions given him. It has been held that to merely allege that the employment of an infant of the age of eight years was negligence per se is a mere conclusion of law and insufficient.<sup>296</sup>

**§ 842. Wanton or wilful negligence.**

It has been stated that contributory negligence is no defense where the master or his servant, with actual knowledge thereof, is afterwards so negligent as to cause the injury.<sup>297</sup>

This phase is often referred to as wanton or wilful negligence, especially in Alabama, and contributory negligence is no defense. If such negligence is relied on the facts relating thereto should be set forth and the negligence should be characterized as wanton or wilful. But a count alleging that the injuries were caused by wanton or intentional negligence, instead of wanton or wilful, is sufficient.<sup>298</sup>

The addition of the words "reckless, gross and wrongful", while entirely unnecessary, is harmless, since not repugnant to the words "wanton, wilful or intentional";<sup>299</sup> but where all these words are used in one count it is

295. *Galveston, Houston & S. A. R. Co. v. Bonn*, 44 Tex. Civ. App. 631, 99 S. W. 413.

296. *Martello v. Fusco*, 21 R. I. 572, 45 Atl. 577.

297. See *supra*, —.

298. *Alabama Great So. R. Co. v. Williams*, 140 Ala. 230, 37 So. 255.

299. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489.

objectionable on the ground of joinder of different causes of action in one count.<sup>300</sup>

Actual as distinguished from constructive knowledge of the danger on the part of the master or negligent servant must be alleged.<sup>301</sup>

### § 843. Violation of statutes or ordinances.

There are in force in nearly all the states one or more statutes enacted for the protection of employees and requiring employers to do certain things, such as furnishing automatic couplers, safeguarding dangerous machinery, protecting elevators, precautions to be taken in mines, etc. So in many states there is a statute forbidding the employment of children under a specified age, at least in certain dangerous lines of work. Some of these statutes expressly provide that assumption of risk or contributory negligence, or both, shall not be a defense, and in some jurisdictions it is so held although there is no such provision in the statute. Of course, if such defenses are not available they need not, in any state, be negatived in a complaint based on such a statute. In preparing a complaint under such a statute it is advisable to use the language of the statute so far as possible and to set forth facts which clearly bring the case within the terms of the statute.<sup>302</sup>

However, it is not necessary to cite or refer to the statute relied on,<sup>303</sup> but it is sufficient to plead such acts

300. *Alabama Great So. R. Co. v. Williams*, 140 Ala. 230, 37 So. 255.

301. *Southern R. Co. v. Bunt*, 131 Ala. 591.

302. Sufficiency of complaint alleging employment of child under 14, see *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277. Where the employment of a child under the statutory age is relied on, the complaint must aver facts from which an employment prohibited by the statute appears.

*Van Wyck v. Dickinson*, 148 Mich. 418, 111 N. W. 1033.

303. *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867; *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 94 Pac. 995, where factory act was relied on; *Bromberg v. Evans Laundry Co.*, 134 Ia. 38, 111 N. W. 417; *Flanagan v. F. W. Carlin Const. Co.*, 134 App. Div. 236, 118 N. Y. Supp. 953; *Severson v. Hill-Warner-Fitch Co.*, 116 App. Div.

of negligence as bring the case within the rule of the statute.<sup>304</sup>

It has been held unnecessary to allege in what manner the failure to comply with the statute caused the injury.<sup>305</sup>

Where the violation of an ordinance is relied on, the general rules relating to pleading ordinances are applicable, and need not be alleged that if the ordinance had been complied with the plaintiff would not have been injured.<sup>306</sup>

#### **Allegations under fellow-servant statutes.**

In many cases a recovery would be barred if it were not for the existence of a statute wholly or in part abolishing the defense of fellow-servants. In such a case it is not necessary in the complaint to specifically refer to the statute relied upon,<sup>307</sup> but plaintiff must positively and directly aver facts showing that the action falls within the particular subdivision on which he relies,<sup>308</sup>

108, 101 N. Y. Supp. 808. But see *Rogers v. Portland Lumber Co.*, 54 Or. 387, 102 Pac. 601, 103 Pac. 514.

304. *Schradin v. New York Cent. & H. R. R. Co.*, 124 App. Div. 705, 109 N. Y. Supp. 428, holding that act of 1906 as to railroad vice-principals need not be pleaded.

305. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

306. *Pittsburg, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660. See also *Pittsburg, C. C. & St. L. R. Co. v. Rogers*, — Ind. App. —, 87 N. E. 28, holding that complaint showed ordinance was in force; *Chicago, I. & L. R. Co. v. Cobler*, 39 Ind. App. 506, 80 N. E. 162, holding substance of ordinance must be alleged.

307. See section on "Violation of statutes or ordinances," *supra*. The 1906 statute in New York making certain employees of railroad companies, vice-principals, need not be pleaded. *Inglese v. New York, N. H. & H. R. Co.*, 133 App. Div. 198, 117 N. Y. Supp. 392.

308. *Chicago, I. & L. R. Co. v. Barnes*, 164 Ind. 143, 73 N. E. 91. Where a servant relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute. *Kelly v. Northern Pac. R. Co.*, 35 Mont. 243, 88 Pac. 1009 [followed in *Thurman v. Pittsburg & M. Copper Co.*, 41 Mont. 141, 108 Pac. 588. In Alabama, the complaint need not

and while it is unnecessary to use the precise words of the statute, yet such words or words equivalent thereto must be used,<sup>309</sup> and it is the better practice to generally use the precise words if possible.

The complaint must show on its face whether it is based on the common law duty of the master or whether it is based on a statute; and if it is based on a statute it should clearly show which statute, or which subdi-

state the name of the person whose act in obeying negligent instructions caused the injury. *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 213, 40 So. 280. In Montana, where a complaint alleges negligence on the part of a railroad company, without mentioning the negligence of any employee, and a recovery cannot be had at common law because the negligent servant was a fellow-servant, the complaint is insufficient as one under the fellow-servant statute, and proof thereunder that the negligence was that of an engineer, within the statute, is inadmissible. *Kelly v. Northern Pac. R. Co.*, 35 Mont. 243, 88 Pac. 1009.

309. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886. It is not necessary, in order to plead a cause of action under the Employer's Liability Act, that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirements of the giving of a notice to the defendant has been complied with. The following statements and allegations in substance in a complaint were held sufficient: That the plaintiff was directed by

the defendant, a foreign corporation, in whose employ he was, to enter an elevator "which the defendant had constructed and then had under its supervision and control," that the elevator was negligently constructed by the defendant "in that the steel rope or cable by which the elevator car was suspended . . . was loosely . . . and improperly fastened to the top of the car and that the safety appliances . . . had not been attached thereto"; that by reason of the defendant's negligence "in directing the plaintiff to enter the car while it was in that condition" and without fault on plaintiff's part, the "cable became unfastened from the elevator" and the car fell, and that by reason of the premises the plaintiff sustained certain injuries. The final paragraph of the complaint alleged that "within 120 days after the occurrence of the said accident . . . and on the 18th day of March, 1903, due notice in writing of the time, place and cause of the injury was given to the defendant in the manner provided by and pursuant to chapter 600 of the laws of 1902. *Harris v. Balt. Mach. & El. Works*, 188 N. Y. 141, 80 N. E. 1028.

vision of the statute it is based upon,<sup>310</sup> although no specific reference need be made thereto.<sup>311</sup>

#### **Federal interstate commerce act.**

The 1908 federal employer's liability act, relating to interstate commerce and the territories, has already been referred to and construed.<sup>312</sup>

If this statute is relied on it, the facts to bring the case within the statute must be specially pleaded, but the complaint need not mention or refer to the statute.<sup>313</sup>

It must allege, *inter alia*, that the defendant was a common carrier engaged in interstate commerce by railroad;<sup>314</sup> although it has been held that plaintiff may allege that whether defendant was engaged in interstate commerce was a matter about which plaintiff had no knowledge or information, under the rule that where a fact is peculiarly within the knowledge of defendant, plaintiff is relieved from the necessity of using that degree of accuracy and certainty which would be required if the facts were known to him.<sup>315</sup>

#### **Statutes as to defects in condition of ways, works, machinery, etc.**

A complaint based on the provisions of the Employer's Liability Acts of Alabama, Massachusetts, New York, New Jersey or Vermont, making the master liable, under certain conditions, where the injury results from defects

310. *Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38.

311. While the complaint, or each count thereof, need not explicitly state under which subdivision of the Employer's Liability Act he seeks to recover, or whether he seeks to recover under the master's common law liability, yet the complaint and each count should be reasonably certain in its averments as to the particular liability sought to be enforced. *Sloss-Shef-*  
3 M. & S.—17

*field Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38.

312. See *supra*, —.

313. If the complaint alleges a cause of action under the federal statute, it is immaterial that the pleading does not mention the statute. *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506.

314. *Walton v. Southern R. Co.*, 179 Fed. 175.

315. *Missouri, K. & T. R. Co. v. Hawley* (Tex. Civ. App.), 123 S. W. 728.

in the ways, works, machinery, etc.,<sup>316</sup> must be either in the words of the statute or substantially the same.<sup>317</sup>

The complaint must state something which is a "defect" within the statute, and hence it is not sufficient to allege a negligent use of the appliance as distinguished from a defect therein.<sup>318</sup>

Furthermore, the complaint must allege the particular "defect" relied upon<sup>319</sup> and describe it with such particularity as to inform the defendant of what he is called upon to defend.<sup>320</sup>

But where a trestle was alleged to be defective, it was held sufficient without stating what part of the trestle was defective.<sup>321</sup>

So, alleging the defect as "a defect in the roadbed or track of defendant railroad" has been held to be sufficient,<sup>322</sup> and where a stationary engine was alleged to

316. See *supra*, ——. A servant who has a cause of action at common law may nevertheless proceed under the Employer's Liability Act in a proper case, as where the injury is caused by a defect in the ways, works, or machinery owing to the employer's negligence. *Proctor v. Rockville C. M. & C. Co.*, 126 N. Y. Supp. 743.

317. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145. Forms of complaints set out in case and held sufficient, see *St. Louis & S. F. R. R. Co. v. Phillips*, 165 Ala. 504, 506 (action based on 1896 statute); *Southern Cotton Oil Co. v. Walker*, 164 Ala. 33, 35-38; *Tal-lassee Falls Mfg. Co. v. Moore*, 158 Ala. 356, 357; *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 373; *Tut-wiler Coal, C. & I. Co. v. Farrington*, 144 Ala. 157, 39 So. 898.

318. *Woodward Iron Co. v. Johnson*, 150 Ala. 365.

319. *Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 39; *Whitmore v. Alabama Consolidated C. & I. Co.*, 164 Ala. 125 [explaining *Jackson Co. v. Cunningham*, 141 Ala. 206, 37 So. 445]; *Whatley v. Zenida Coal Co.*, 122 Ala. 127, 26 So. 124. See *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 So. 96, where nature of defect in bridge held sufficiently described. But see *supra*, § 836.

320. *Louisville & N. R. Co. v. Jones*, 130 Ala. 456, 30 So. 586.

321. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368.

322. *St. Louis & S. F. R. R. Co. v. Phillips*, 165 Ala. 504; *Alabama G. S. R. Co. v. Davis*, 119 Ala. 573, 24 So. 862. "Railway" held synonymous with "track." *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 So. 445.

be defective it was held not necessary to specify what part of the engine was defective.<sup>323</sup>

So it has been held that a complaint describing the defect as one in the condition of the electric lighting apparatus on a pole mentioned, is sufficient.<sup>324</sup>

It is not sufficient to merely allege the existence of a defect where the condition described refutes the conclusion, but the pleader must go further and show the surrounding conditions, etc., going to make up the defect.<sup>325</sup>

The complaint need not show a defect in the ways, works, etc., but it is sufficient to show a defect in the "condition" of the ways, works, etc.<sup>326</sup>

In Alabama, where several defects are alleged conjunctively, it is necessary to prove, or to introduce evidence tending to prove, all of the defects.<sup>327</sup>

So, in Alabama, under the statute, counts are defective which do not show by averment that the defect complained of "arose from or had not been discovered or remedied owing to the negligence of the master, or some person in his service, and intrusted by the master with the duty of seeing that the ways, works, machinery or plant were in proper condition";<sup>328</sup> but it is not necessary to give the name of the servant intrusted with such duty.<sup>329</sup>

#### Statutes making master liable for acts of superintendent.

The Employer's Liability Act of Alabama, Massachusetts, New Jersey and Vermont, make superintendents

323. *Sloss-Sheffield Steel & Iron Co. v. Hutchison*, 144 Ala. 221, 40 So. 114.

324. *Willey v. Boston Electric Light Co.*, 168 Mass. 40.

325. *Huyck v. McNerney*, 163 Ala. 244.

326. *Jones v. Tennessee C. I. & R. R. Co.*, 163 Ala. 266.

327. *Tobler v. Pioneer Mining & Mfg. Co.*, 166 Ala. 482.

328. *Sloss-Sheffield Steel & Iron Co. v. Bibb*, 164 Ala. 62, 70; *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145; *Central of Ga. R. Co. v. Lamb*, 124 Ala. 172, 26 So. 969.

329. *Louisville & N. R. Co. v. Lile*, 154 Ala. 556, 45 So. 699, and cases cited. Contra, *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325 [overruled by Wood-



vice-principals; and the New York statute is even broader than the others in this respect since a recent amendment.<sup>330</sup>

A complaint based on this statutory provision should closely follow the particular statute.<sup>331</sup>

Under the Alabama statute, the complaint must allege that the superior servant has "superintendence intrusted to him" and that injury occurred while in the "exercise of such superintendence",<sup>332</sup> and the same is true in Massachusetts, New Jersey and Vermont except that in the latter states it must be alleged that the sole or principal duty of the negligent servant was that of superintendence. In pleading under the New York statute, the recent amendment of 1910 should be kept in mind,<sup>333</sup> although undoubtedly a complaint good under the old law would be sufficient under the statute as amended.

It would seem unnecessary in any of the states to allege what the superintendence was.<sup>334</sup>

The complaint must show that the alleged negligent superintendent was in the employ of defendant at the time of the accident,<sup>335</sup> and show that he was in fact negligent.<sup>336</sup>

ward Iron Co. v. Herndon, 114 Ala. 191, 21 So. 430.]

330. See supra, —.

331. Forms of counts held sufficient, see Seaboard Mfg. Co. v. Woodson, 94 Ala. 143, 10 So. 87; Southern Car & Foundry Co. v. Bartlett, 137 Ala. 234, 34 So. 20; Southern R. Co. v. Shields, 121 Ala. 460, 25 So. 811, 77 Am. St. Rep. 66.

332. United States C. I. P. & F. Co. v. Driver, 162 Ala. 580, 50 So. 118; Southern Car & Foundry Co. v. Bartlett, 137 Ala. 234, 34 So. 20; Bear Creek Mill Co. v. Parker, 134 Ala. 293, 32 So. 700. See also Louisville & N. R. Co. v. Bouldin, 110 Ala. 185, 20 So. 325.

Allegations held to sufficiently show that superintendence which defendant's superintendent had was intrusted to him by defendant. Bessemer Land & Improvement Co. v. Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

333. See supra, —.

334. Western Steel Car & F. Co. v. Cunningham, 158 Ala. 369, 48 So. 109; Louisville & N. R. Co. v. Orr, 94 Ala. 602, 10 So. 167.

335. See Highland Ave. & Belt R. Co. v. Dusenberry, 98 Ala. 239, 13 So. 308.

336. Decatur Car Wheel & Mfg. Co. v. Mehaffey, 128 Ala. 242, 29 So. 646. Must be some fact



In Alabama, however, the averment of specific negligence is not required.<sup>337</sup>

It is proper, at least in New York, to allege the negligence to be that of defendant rather than of the superintendent.<sup>338</sup>

In Alabama, a count for personal injury of an employee resulting from the negligence of another employee, who is intrusted with superintendence, must allege the name of such employee, or that it is unknown to plaintiff;<sup>339</sup> but the contrary is held in Massachusetts.<sup>340</sup>

Alleging that a yard master was intrusted with superintendence "in the placing and position of cars" necessarily implies that he was intrusted with superintendence over men and not merely over inanimate things.<sup>341</sup>

#### Statutory provision as to injury from conformity to orders of superior servant.

In Indiana, as already stated,<sup>342</sup> the Employer's Liability Act contains a provision making the master liable where the injury results from the negligence of any person in the service of the employer, "to whose order or direction the injured employee at the time of the injury was bound to conform and did conform";<sup>343</sup> and in Alabama the statute is nearly identical with the addition of the clause "if such injuries resulted from his having so conformed."<sup>344</sup>

stated on which charge of negligence can be predicated. *Pagnillo v. Mack Paving & C. Co.*, 142 App. Div. 491, 127 N. Y. Supp. 72.

337. *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17. See also *St. Louis & S. F. R. Co.*, — Ala. —, 53 So. 305.

338. *Harris v. Baltimore Machine & Elevator Works*, 112 App. Div. 389, 98 N. Y. Supp. 440 [affirmed in 188 N. Y. 141, 80 N. E. 1028].

339. *Woodward Iron Co v.*

*Herndon*, 114 Ala. 191, 21 So. 430; *Central Foundry Co. v. Bailey*, 162 Ala. 623, 50 So. 346, holding that if name be averred to be unknown it must be proved.

340. *Woodbury v. Post*, 158 Mass. 140.

341. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

342. See *supra*, —.

343. *Burns'* 1908 Ind. St., § 8017, subd. 2.

344. Code Ala. 1907, § 3910, subd. 3.

In setting forth a cause of action under these subdivisions it is advisable to follow the statute as closely as possible, and great care should be taken to see that all the necessary facts required by the statute are alleged.<sup>345</sup>

In order to state a cause of action under this subdivision it is necessary, in addition to the allegations required in all complaints by a servant, that the complaint state facts which show the following:<sup>346</sup> (1) that the relation of master and servant existed between defendant and the negligent employee;<sup>347</sup> (2) that the negligent servant had authority to give the order;<sup>348</sup> (3) that the person injured was bound to comply with such order;<sup>349</sup> (4) that the injury resulted from conforming to such orders;<sup>350</sup> (5) that the order was a special order, not as broad as the general scope of the employment;<sup>351</sup> (6) if the negligence consists in the giving of an order, that the order was

345. *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193, 22 So. 854. See also *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414, 68 N. E. 925; *Thacker v. Chicago, I. & L. R. Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792. Must show that the injury was caused by the negligence of the superior servant. *Ft. Wayne Iron & Steel Co. v. Parsell*, 168 Ind. 223, 79 N. E. 439. Forms of complaints held sufficient, see *Louisville & N. R. Co. v. Wynn*, 166 Ala. 413, 414; *Alabama Steel & Wire Co. v. Tallant*, 165 Ala. 521, 523; *Chicago, I. & L. R. Co.*, 33 Ind. App. 379, 71 N. E. 524.

346. *Richey v. Cleveland, C. C. & St. L. R. Co.*,—Ind. App.—, 93 N. E. 1022; *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158.

347. See *supra*, § 825.

348. *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178, 71 N. E. 59.

349. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178, 71 N. E. 59.

350. *Central of Ga. R. Co. v. Lamb*, 124 Ala. 172, 26 So. 969; *Louisville & N. R. Co. v. Barganier*, —Ala.—, 53 So. 138. This probably need not be alleged in Indiana, since the statute does not contain the Alabama provision "if such injuries resulted from his having so conformed"; but in Indiana the servant must have been injured while complying with the order.

351. See *Southern Ind. R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414, 68 N. E. 925; *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845.

“negligently” given,<sup>352</sup> but it is not necessary to aver in what particular or respect the orders or directions were negligent;<sup>353</sup> (7) if the order was not negligently given, that, while plaintiff was performing his duty in carrying out said order, and while he was in a place where he was required to be in the performance of his duty, under said order, he was injured through some negligent act or omission of the servant giving the order or direction;<sup>354</sup> and (8) in Indiana, that plaintiff was employed by one engaged in the operation of railroads.

Under the statute, it is held in Indiana, where assumption of risk must ordinarily be negatived, that it is not necessary so to do under this subdivision.<sup>355</sup>

In Alabama, the complaint must also state the name of the negligent servant or allege it to be unknown to plaintiff.<sup>356</sup>

Provisions more or less like those of Alabama and Indiana are found in some of the very recent fellow-servant statutes as to which there has been no decisions construing their meaning, and also in some of railroad fellow-servant statutes.

Under a constitutional provision in Mississippi providing that “any person having the right to control or direct the services of the party injured” is not a fellow-servant of such person, a declaration charging that

352. *Alabama Steel & Wire Co. v. Clements*, 146 Ala. 259; *Southern Car & Foundry Co. v. Bartlett*, 137 Ala. 234, 34 So. 20; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 So. 700.

353. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145. But see *Louisville & N. R. Co. v. Barganier*, — Ala. —, 53 So. 138, which apparently holds the contrary.

354. *Richey v. Cleveland, C. C. & St. L. R. Co.*, — Ind App. —, 93 N.

E. 1022. See also *Muncie Pulp Co. v. Davis*, 162 Ind. 558, 70 N. E. 875. It seems, however, that in Alabama, the negligence of the superior can consist only in giving the order. *Louisville & N. R. Co. v. Barganier*, — Ala. —, 53 So. 138.

355. *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845.

356. *Alabama Steel & Wire Co. v. Clements*, 146 Ala. 259, 40 So. 97.

injuries to a fireman were caused by an engineer and adding the very language of the statute, is sufficient.<sup>357</sup>

**Statutory provisions as to person in charge of engine, train, etc.**

The statutory provisions in New York, Massachusetts, Alabama, Indiana, New Jersey, Vermont, and some other states abolishing the fellow-servant rule where the negligence is that of a servant "in charge" of an engine, train, car, etc., "on a railway" have been referred to in the chapter on fellow-servants.<sup>358</sup>

Under such statutes, the complaint must closely follow the provisions of the particular statute, such statutes differing somewhat in the particular states.<sup>359</sup>

It must be alleged that the negligent servant was an employee of defendant;<sup>360</sup> that the person whose negligence is complained of was "in charge" of the train, en-

357. *Cheaves v. Southern R. Co.*, 82 Miss. 48, 34 So. 385.

358. See *supra* —.

359. See *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845. Under the statute, a complaint is sufficient which alleges that an engineer while in the employ of the defendant railroad company, in charge of a locomotive, negligently injured the plaintiff who was a brakeman, both at the time acting in the line of duty as employees of such company. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875. Forms of complaint set out and held sufficient, see *Southern R. Co. v. Carter*, 164 Ala. 103. *Birmingham, R. L. & P. Co. v. Mosely*, 164 Ala. 111, 113; *Alabama Great Southern R. V. Brock*, 161 Ala. 351, 352, 49 So. 453; *Woodward Iron Co. v. Lewis*, —

Ala. —, 54 So. 566. *Louisville & N. R. Co. v. Markee*, 103 Ala. 160, 15 So. 511, 49 Am. At. Rep. 21; *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46, 61 N. E. 18. In Indiana, it is held that it is sufficient for plaintiff to allege that he was injured while in the line of duty in the service of the railroad corporation, and in the exercise of due care and diligence (this clause not necessary now), by the negligence of the (conductor) in the service of such corporation who at the time had charge of one of its trains upon a railway, and was acting within the scope of his employment. *Chicago, I. & L. R. Co. v. Williams*, 168 Ind. 276, 79 N. E. 442. See also *Cleveland, C. C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723.

360. *Alabama Great S. R. Co. v. Williams*, 140 Ala. 230, 37 So. 255.

gine, etc.;<sup>361</sup> and that the engine, train, etc., was on a railway.<sup>362</sup>

In Alabama, the name of the negligent servant must be alleged or that his name is unknown to plaintiff,<sup>363</sup> but the complaint need not specifically allege that the negligent servant was at the time in discharge of the duties of his employment.<sup>364</sup>

Failure to confine the negligence alleged to a single employee in charge of a locomotive is not an objection.<sup>365</sup>

In Alabama, very general allegations of negligence on the part of the offending servant are held sufficient,<sup>366</sup> and in

361. *Tennessee, C. I. & R. Co. v. Bridges*, 144 Ala. 229, 39 So. 902, 113 Am. St. Rep. 35; *Central of Ga. R. Co. v. Lamb*, 124 Ala. 172, 26 So. 969. See also *Southern Ind. R. Co. v. Baker*, 37 Ind. App. 405, 77 N. E. 64. In *Southern Indiana R. Co. v. Osborn*, 39 Ind. App. 333, 78 N. E. 248, the objection that this appeared only by recital was held not tenable. See *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, — Ind. App. —, 87 N. E. 28, where express averment held unnecessary.

362. *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 139 Ala. 425, 36 So. 181; *Woodward Iron Co. v. Lewis*, — Ala. —, 54 So. 566; *Tennessee Coal, Iron & R. Co. v. Bridges*, 144 Ala. 229, 39 So. 902, 113 Am. St. Rep. 35; *Alabama, G. S. R. Co. v. Davis*, 119 Ala. 572, 24 So. 862. In *Mobley's case*, 139 Ala. 425, 36 So. 181, it was held that a complaint that alleged that the defendant was operating a locomotive and a switch engine in the handling of material for its furnace, and that the negligent servant who caused the injury was the engineer who had charge or control of said switch engine, set up

no sufficient averment that the engine was upon a railway.

363. *Central of Ga. R. Co. v. Lamb*, 124 Ala. 172, 26 So. 969; *Southern R. Co. v. Cunningham*, 112 Ala. 496, 20 So. 639. Where injuries were alleged to have resulted "from the negligence of ——— Gould," it was not necessary for plaintiff to aver that he had made diligent effort to ascertain the employee's full name but had failed to ascertain it. *Northern Ala. R. Co. v. Shea*, 142 Ala. 119, 37 So. 796.

364. *Woodward Iron Co. v. Herndon*, 114 Ala. 191, 21 So. 430; *Alabama Great Southern R. Co. v. Brock*, 161 Ala. 351, 49 So. 453. Compare, § 828, next to last paragraph.

365. *Chicago & E. R. Co. v. Lain*, Ind. App. 72 N. E. 539.

366. *Northern Alabama R. Co. v. Shea*, 142 Ala. 119, 37 So. 796 (running engine at dangerous and reckless rate of speed); *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 139 Ala. 425, 36 So. 181 (negligence of engineer not specified); *Alabama Great Southern R. Co. v. Brooks*, 135 Ala. 401, 33 So. 181 (negligence of engineer "in operat-

Indiana it is held that an allegation that the engineer "negligently ran said engine and train into, and causing them to collide with the rear end of one of defendant's freight trains" at a certain place is sufficient.<sup>367</sup>

In Indiana, the complaint must show that defendant was engaged in the operation of a railroad.<sup>368</sup>

If a railroad statute designates certain named servants as vice-principals, the complaint based thereon must state to which class the negligent servant belonged.<sup>369</sup>

#### § 844. Pleading damages.

In pleading the damages sustained, the general rules relating to pleading damages in actions for personal injuries based on negligence are applicable. The complaint should state what the injuries were, and if special as distinguished from general damages are claimed they must be specifically set forth. Pain and suffering need not be specially alleged, however, nor need the loss of time and earnings. If the injury is a permanent one, evidence is admissible to show it to be so although the permanency is not specially pleaded.

If exemplary damages are sought, the facts warranting their recovery must be alleged but such damages need not be specifically prayed for. If the fellow-servant or any other statute in the state precludes recovery by certain persons other than the injured person, unless certain facts exist, the complaint should bring the case within the statute by appropriate allegations.

The amount of the damages should be fixed at a sum at least equal to any sum the court or jury may award,

ing the engine"); *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 So. 700; *Highland Ave. & B. R. Co. v. Miller*, 120 Ala. 535, 24 So. 955; *Southern R. Co. v. Arnold*, 114 Ala. 183, 21 So. 954. See also *supra*, § 828.

367. *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind. 569, 71 N. E. 661. Nearly identical alle-

gations held sufficient in *Chicago, I. & L. R. Co. v. Cobler*, 39 Ind. App. 506, 80 N. E. 162.

368. *American Car & Foundry Co. v. Inzer*, 172 Ind. 56, 87 N. E. 722.

369. *Albrecht v. Milwaukee & S. R. Co.*, 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30.

since the verdict or findings cannot exceed the sum claimed.

**§ 845. Joinder of grounds in same count.**

Two causes of action cannot be joined in the same count. Where there is such a joinder, the objection may be reached by demurrer in some jurisdictions while in others a motion is the proper remedy.

Under this rule, both under the codes and under the common law system of pleading, a complaint cannot set up two or more distinct and independent breaches of duty in the same count.<sup>370</sup> Thus, plaintiff cannot join in one and the same count a cause of action for negligence based on the violation of the duty to furnish a safe place to work with one based on the failure to furnish safe tools or machinery.

Likewise, a common law cause and a statutory cause cannot be joined in one count, especially where inconsistent,<sup>371</sup> nor can two or more different statutory causes where the ground or which plaintiff relies is thereby made uncertain.<sup>372</sup>

Plaintiff cannot join in the same count a cause of action based on one subdivision of an Employers' Liability Act with another based on a different subdivision.<sup>373</sup>

But where the acts of negligence charged are of the same character and naturally lead up to and contribute to the same accident, any number of distinct acts may be alleged in one count.<sup>374</sup>

Or, as stated in another case, a complaint in a personal injury case is not bad for duplicity although it alleges two acts of negligence on the part of defendant, where the

370. *La Porte v. Cook*, 20 R. I. 261, 38 Atl. 700.

371. *Yazoo & M. V. R. Co. v. Wallace*, 90 Miss. 609, 43 So. 469.

372. *Louisville & N. R. Co. v. Orr*, 94 Ala. 602, 10 So. 167. Compare *Birmingham Southern R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979; *Kansas City, M. & B.*

*R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

373. *Richardson v. St. Louis & H. R. Co.*, 223 Mo. 325, 123 S. W. 22.

374. *Richardson v. St. Louis & H. R. Co.*, 223 Mo. 325, 123 S. W. 22.



two acts, as charged, contributed or were capable of contributing to produce the injury, and were cumulative, each tending to support the other.<sup>375</sup>

So the pleader may, in a single count, ascribe the injury suffered to concurrent, coalescing breaches of duty under two or more subdivisions of the Employers' Liability Act; but it must aver that these acts of negligence jointly caused the injury suffered.<sup>376</sup>

The fact that the complaint, in stating a cause of action under one subdivision of the Employers' Liability Act, incidentally states facts also constituting a cause of action under another subdivision, does not render it demurrable.<sup>377</sup>

#### § 846. Joinder of counts.

It is common practice, and permissible, to join different counts based on the violation of different duties, and also counts based on the common law and counts based on a statute.<sup>378</sup>

375. *Flynn v. Staples*, 34 App. D. C. 92, where defective condition of steam supply pipe and the absence of a steam gauge were held properly alleged in the same count. To same effect, see *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341.

376. While two or more separate causes of action under the statute cannot be joined in the same count, yet the complaint may, in a single count, ascribe the injury to concurrent, coalescing breaches of duty under two or more subdivisions of the Employer's Liability Act, thereby constituting a single cause of action, but in such case he must prove not only the several negligences averred but also that they each concurred to produce the injury complained of. *Louisville*

& N. R. Co. v. *Fitzgerald*, 161 Ala. 397, 49 So. 860.

377. *Chicago & E. R. Co. v. Lain* — Ind. App. —, 72 N. E. 539.

378. *Richardson v. St. Louis & H. R. Co.*, 223 Mo. 325, 123 S. W. 22. Common laws counts, *Crane v. T. J. Congleton & Bros. (Ky.)*, 116 S. W. 341. It is a common and commendable practice to state the case in different counts with such variation of statement as necessary to meet every possible phase of the testimony, so that if plaintiff fails in the proof of one count he may succeed on another and thus prevent a fatal variance; and repugnancy between the counts is not a ground of demurrer. *Seal v. Virginia Portland Cement Co.*, 108 Va. 806.



And not only may the complaint join counts for a common law cause of action with counts based on a statute, but also counts based on different subdivisions of the statute.

However, where the injured servant has died, an administrator cannot join statutory and common law counts where the claims do not accrue to him in the same capacity.<sup>379</sup>

#### **Election between counts.**

Except where otherwise provided by statute, defendant may generally compel plaintiff to elect as between inconsistent counts in the complaint.<sup>380</sup>

But where a cause of action exists both at common law and under the statute, plaintiff cannot be compelled to elect between the two before trial;<sup>381</sup>

But in Massachusetts where a declaration contains counts at common law and under the Employers' Liability Act, presenting different issues and involving different liabilities in damages, it is within the discretion of the presiding judge to require the plaintiff to elect whether he will go to the jury on the counts at common law or those framed upon the statute.<sup>382</sup>

#### **§ 847. Bill of particulars.**

In some states where bills of particulars are ordered in proper cases, such a bill may be required to specify in what respect the appliance or place of work is unsafe,<sup>383</sup> or the like.

379. *Brennan v. Standard Oil Co.*, 187 Mass. 376, which, however, was not a master and servant case.

380. Counts for failure to furnish safe place to work and for negligence of fellow-servant are not inconsistent. *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313.

381. *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. Supp. 337.

382. *Brady v. Ludlow Mfg. Co.*, 154 Mass. 468, 28 N. E. 901.

383. *O'Leary v. Candee*, 60 N. Y. Supp. 1103.

**§ 848. Sufficiency of complaint as dependent on when attacked.**

A complaint, although very general in its terms so as to be demurrable, may be sufficient when first attacked after verdict.<sup>384</sup>

**§ 849. Amendments.**

If the time to amend as of course has elapsed, and the application is not made before trial, the general rule is that a new or different cause of action cannot be set up or added by way of amendment during or after the trial. The rule is well settled in most jurisdictions but the difficulty comes in determining whether a new cause of action is stated or whether the added matter is merely an amplification of the cause of action originally stated.

Under this rule that an amendment on or after the trial cannot set up a new or different cause of action, it has been held that where failure to warn was relied on, an amendment setting up that the machinery used was defective cannot be allowed.<sup>385</sup>

So where negligence in using different systems of bumpers was alleged, an amendment charging negligence in having bumpers loose and out of repair was improper.<sup>386</sup>

So where the amendment sets up a statutory cause of action, and the original complaint relies on a right of action created at common law, a new cause of action is set up.<sup>386</sup>

On the other hand it has been stated in a recent case in Rhode Island,<sup>387</sup> that "the great weight of authority is to the effect that the allowance of an amendment to a de-

384. See *Broderick v. Detroit Union R. R. S. & D. Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

385. *Mayer v. Ramsay-Brisvane Stone Co.*, 119 Ga. 734, 46 S. E. 844.

385. *Box v. Chicago, R. I. & P. R. Co.*, 107 Ia. 660, 78 N. W. 694.

386. *McCray v. Moweaqua Coal Min. Co.*, 149 Ill. App. 565.

387. *Chobonian v. Washburn Wire Co.*, —R. I. —, 80 Atl. 394.

claration, setting forth an additional ground of negligence as the cause of the same injury, does not amount to the statement of a new cause of action."<sup>388</sup>

388. *Smith v. Missouri Pac. Ry. Co.*, 56 Fed. 458, 5 C. C. A. 557; *Cross v. Evans*, 86 Fed. 1, 29 C. C. A. 523; *Columb v. Webster Mfg. Co.*, 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195; *Berube v. Horton*, 199 Mass. 421, 85 N. E. 474; *Daley v. Gates*, 65 Vt. 591, 27 Atl. 193; *McIntire v. Eastern Railroad*, 58 N. H. 137; *Babb v. Paper Co.*, 99 Me. 298, 59 Atl. 290; *Kuhns v. Railway Co.*, 76 Iowa, 67, 40 N. W. 92; *Sheffield v. Harris*, 112 Ala. 614, 20 South. 955; *Greer v. Railroad Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; *Pickett v. Railway*, 74 S. C. 236, 54 S. E. 375; *Lee v. Republic Steel Co.*, 241 Ill. 372, 89 N. E. 655; *Tanner v. Harper*, 32 Colo. 156, 75 Pac. 404.

In *Chobonian v. Washburn Wire Co.*, — R. I. —, 80 Atl. 394, by amendment, it was held proper to set forth the following additional specifications of negligence, viz., that improper hooks were used in connection with the trunnions and specifying in what particulars the hooks were improper, the employment of incompetent fellow-servants, and the defendant's failure to properly inspect.

The rule is stated in 1 Ency. Pl. & Pr. 564, as follows: "As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different

matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony." In *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318, the question was whether an amendment to the declaration was properly allowed under a statute providing that, "no amendment adding a new and distinct cause of action, or new and distinct parties, shall be allowed, unless expressly provided for by law." The plaintiff sued for damages for personal injuries resulting from the fall of a shed built over a sidewalk. The negligence alleged in the original declaration was that the municipal authorities had changed the grade of a certain street and put insufficient drains therein, so that the surface water was allowed to pond near and upon the sidewalk and cause a washout, which the municipal authorities negligently filled with unsuitable material, thereby causing the support of the shed to settle, and as a result the wooden shed fell upon the plaintiff. The trial court allowed an amendment setting forth a further ground of negligence, in this, that the defendant had failed in its duty to inspect said shed, and permitted said street to be dangerous by allowing said shed to stand, and that from said neglect of duty said shed fell and injured the plaintiff. The court held that the amendment was properly allowed, and that no new and distinct cause of action is

## III. ANSWER.

## § 850. General considerations.

The general rules as to the necessity of specially pleading affirmative defenses apply to the class of actions now under consideration,<sup>389</sup> as do the other rules governing the form and contents of an answer or plea.

added by an amendment containing additional matter descriptive of the same wrong originally pleaded. The rule is laid down that, when in an action *ex delicto* the declaration sets out certain acts of negligence, to show a violation by defendant of the plaintiff's right, such petition may be amended by setting out additional acts of negligence to show substantially the same violation of the same right. The reasoning of the court is shown in the following excerpts from the opinion: "So long as a plaintiff pleads but one wrong, he does not set up more than one cause of action. Courts will look to the allegations, both as to the primary right of the plaintiff and the corresponding primary duty of the defendant, and as to the violation or breach thereof, in order to determine whether it is the intention to plead but a single cause of action. In *Allen v. Tuscarora Valley R. Co.*, 229 Pa. St. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, the declaration was at common law for injury resulting from the negligence of defendant in using a coupler more dangerous than the usual coupler employed on railroads. The amendment alleged that the railroad was engaged in interstate commerce, and its cars

were equipped with couplers in violation of the act of Congress of March 2, 1893. Such a change was held to be a departure in law.

In *Pratt v. Cir. Judge*, 105 Mich. 499, 63 N. W. 506, the amendments offered stated that the plaintiff was in the exercise of due care, and did not in any way contribute to the injury. The court say: "The declaration, as amended, relates to precisely the same state of facts, and no new theory is evolved by the proposed amendments, which simply amplify the averments contained in the original declaration by statements in no way inconsistent with those originally set out. It is a question of acknowledged difficulty to ascertain in just what cases an amendment may be said to set out a new cause of action. . . . And, when the amendment does not introduce a new cause of action, the running of the statute of limitations is arrested at the date of the institution of the suit."

389. Under the plea of the general issue, defendant may deny plaintiff's duty to obey the order in the execution of which he was injured, the negligence relied on being that of a superior in giving an order, under the statute. *Louisville & N. R. Co. v. Wynn*, 166 Ala. 413.

In Massachusetts, where the time limit to sue under the Employers' Liability Act is fixed at one year, the defense of lapse of time may be urged under a general denial in the answer, the statute being held not a mere statute of limitations but one stating a condition precedent to the right to sue.<sup>390</sup>

### § 851. Alleging assumption of risk.

In considering the necessity and sufficiency of pleas of assumed risk, it is necessary to keep in mind the difference between the assumption of the "ordinary" risks of the employment, such risks being independent of any negligence of the employer, and the assumption of "extraordinary" risks arising from the negligence of the employer. If the risk is of the former kind it need not be pleaded by defendant, since proof to show such fact merely goes to disprove the allegations of the complaint that defendant was negligent.<sup>391</sup>

On the other hand, it is held in nearly all of the states that where the risk assumed is an "extraordinary" one it can not be urged unless specially pleaded as a defense,<sup>392</sup>

390. Where the limitation of time to sue is in the nature of a condition to plaintiff's cause of action, lapse of time may be proved under a general denial. *McRae v. New York, N. H. & H. R. Co.*, 199 Mass. 418, 85 N. E. 425.

391. A plea of assumption of risk "incident to such employment," which is in effect merely a plea of the assumption of an "ordinary" risk and can be relied on under a general denial, is to be distinguished from a plea of assumption of risk from perils created or enhanced by the master's lack of reasonable care, i. e., assumption of an "extraordinary" risk. The first plea does not raise the latter defense which must be specially pleaded to be available. *Vohs v.*

*Shorthill & Co.*, 130 Ia. 538, 107 N. W. 417; *Obenchain v. Harris & Cole Bros.*, — Ia. —, 126 N. W. 960; *Duffey v. Consolidated Block Coal Co.*, 147 Iowa, 225, 124 N. W. 609. Contra, see *Boin v. Spreckels Sugar Co.*, 155 Cal. 612, 102 Pac. 937, holding defense of assumption of ordinary risks must be pleaded. The same rule laid down in Iowa has been enunciated in Nebraska. *Evans Laundry Co., v. Crawford*, 67 Neb. 153, 93 N. W. 177. And in Oregon, *Tucker v. Northern Pac. R. Co.*, 41 Or. 82, 68 Pac. 426. And, it seems, in Colorado, *City of Greeley v. Foster*, 32 Colo. 292, 306.

392. In most of the states the defense of assumption of risk is an affirmative one and must be

although in some states it is still necessary to negative assumption of risk in the complaint,<sup>393</sup> and in such jurisdictions it would seem to follow as a matter of course that a general denial will suffice to put such allegations in issue and that therefore the defense may be proved although not specially pleaded.<sup>394</sup>

Assumption of risk need not be pleaded in Missouri, it is held,<sup>395</sup> but inasmuch as in that state the rule as to assumption of "extraordinary" risks is practically abolished, the holding in effect coincides with those in most of the other states that assumption of "ordinary" risks need not be pleaded.

Assumption of risk may be taken advantage of, however, in any jurisdiction, although not pleaded, where it is shown by plaintiff's own evidence,<sup>396</sup> or by his pleadings.

#### **As distinguished from plea of contributory negligence.**

In another connection, the difference between the defenses of assumed risk and contributory negligence has been considered at some length.<sup>397</sup>

It follows that a plea attempting to set up assumption of risk but alleging facts showing contributory negligence is insufficient, and vice versa.<sup>398</sup>

pleaded. This has been expressly held in Alabama, Arkansas, California, Florida, Indian Territory, Iowa, Montana, Nebraska, North Carolina, South Carolina, Texas, Utah and Washington. The rule is to the contrary in Indiana. See *supra*, §§ 768, 832.

393. See *supra*, § 768.

394. *Baker v. Barker Asphalt Paving Co.*, 92 Fed. 117; *American Car & Foundry Co. v. Clark*, 32 Ind. App. 644, 70 N. E. 828. *Contra*, *Louisville & N. R. Co. v. Orr*, 84 Ind. 50.

395. *George v. St. Louis & S. F. R. Co.*, 225 Mo. 364, 125 S. W. 196; *Dakan v. G. W. Chase & Son Mercantile Co.*, 197 Mo. 238, 94 S. W. 944; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167.

396. *Yazoo & M. V. R. Co. v. Woodruff*, — Miss. —, 53 So. 687.

397. See *supra* —. Plea construed as one setting up contributory negligence rather than assumption of risk, see *Ogilvie v. Conway Lumber Co.*, 80 S. C. 7, 61 S. E. 200.

398. *New Connellsville C. & C. Co. v. Kilgore*, 162 Ala. 642.

### Sufficiency of plea.

The plea of assumption of "extraordinary" risks need not be in any particular form of words.<sup>399</sup>

The plea must allege or show either that the defect was obvious or was known to plaintiff,<sup>400</sup> and also either expressly allege, or show by necessary inference, that plaintiff knew or should have known the risk or danger as well as the defect.<sup>401</sup>

Where the facts alleged show that the danger was obvious, the plea need not expressly aver that it was obvious.<sup>402</sup>

Where knowledge of the alleged incompetency of the negligent servant is relied on as an assumption of the risk, it is necessary to expressly aver knowledge of such incompetency.<sup>403</sup>

A plea of assumption of "ordinary" risks, even if conceded to be necessary in any case, may be very general in its terms.<sup>404</sup>

If a particular risk or risks assumed are specified in the plea, the defendant is restricted to those alleged and cannot prove other risks assumed.<sup>405</sup>

399. See *Going v. Alabama Steel & Wire Co.*, 141 Ala. 537, 37 So. 784. Forms of pleas of assumption of risk, set out in full and held sufficient, see *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441, 446; *Bryant v. Alabama, Great So. R. Co.*, 155 Ala. 368, 371; *Price v. St. Louis, S. R. Co.*, 38 Tex. Civ. App. 309, 85 S. W. 858 (plea of assumption of "ordinary" risk).

400. *Pierson Lumber Co. v. Hart*, 144 Ala. 239, 39 So. 566; *Western R. of Ala. v. Russell*, 144 Ala. 142, 39 So. 311, 113 Am. St. Rep. 24. But in Alabama a plea alleging knowledge "or notice" of the danger has been held insufficient. *Merriweather v. Sayre*

*Mining & Mfg. Co.*, 161 Ala. 441; *Osborne v. Alabama Steel & Wire Co.*, 135 Ala. 571, 33 So. 687.

401. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348; *Southern R. Co. v. McGowan*, 149 Ala. 440, 43 So. 378.

402. *Alabama, Great So. R. Co. v. Brooks*, 135 Ala. 401, 33 So. 181.

403. *First Nat. Bank of Montgomery v. Chandler*, 144 Ala. 286, 39 So. 822, 113 Am. St. Rep. 39.

404. See *Charping v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186; *Bryan v. International & G. N. R. Co.* (Tex. Civ. App.), 90 S. W. 693; *Adams v. San Antonio & A. P. R. Co.*, 34 Tex. Civ. App. 413, 79 S. W. 79.



### § 852. Alleging failure of servant to report defects.

Under the statutory provisions existing in some states precluding a recovery by an injured servant where he knew of the defect before the injury but failed to notify the master thereof, this is a defense which must be specially pleaded by defendant.<sup>406</sup>

But a plea that plaintiff knew of the defect but did not inform the master is sufficient where in the language of the statute.<sup>407</sup>

A plea that the servant knew of the defect or danger and did not report it to the master is not insufficient, under the statute, because it does not allege that the master did not know of the defect, but that is ground for replication.<sup>408</sup>

### § 853. Alleging contributory negligence.

In most jurisdictions, contributory negligence is an affirmative defense and must be specially pleaded.<sup>409</sup>

In some states, however, the defense must be negatived in the complaint,<sup>410</sup> although in the latter class of states the rule has been changed in several, including New York and Indiana, by a more or less recent statute,<sup>411</sup> and in such states the defense may be shown under a general denial or the general issue.<sup>412</sup>

405. *International & G. N. R. Co. v. Garcia* (Tex. Civ. App.), 117 S. W. 206.

406. See *supra*, ——. Form of plea of knowledge of defect by employe and failure to inform master, held sufficient, see *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441, 446.

407. *Merriweather v. Sayre Milling & Mfg. Co.*, 161 Ala. 441. Need not allege knowledge of the "danger" as distinguished from the "defect." *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188.

408. *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188.

409. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262. See also *supra*, §§ 769, 833.

410. See *supra*, §§ 769, 833.

411. By a recent statute, in Indiana, contributory negligence need not be negatived in the complaint but may be proved under a general denial. *Bum's Ind. St.* 1908, § 362.

412. *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201; *Dover v. Lockhart Mills*, 86 S. C. 229, 68 S. E. 525.



If the complaint alleges that the plaintiff was without fault, a denial of this allegation raises the issue of contributory negligence.<sup>413</sup>

No plea of contributory negligence is necessary where plaintiff's own case necessarily puts in issue all the facts relied on by defendant to show contributory negligence,<sup>414</sup> nor where plaintiff's own testimony shows that he is guilty of contributory negligence.<sup>415</sup>

#### Sufficiency of plea.

In some jurisdictions it is held that contributory negligence must be pleaded with the same degree of particularity as is required of the plaintiff in pleading negligence on the part of the defendant.<sup>416</sup>

In Alabama, greater particularity is required in allegations of contributory negligence by the defendant than is required of the plaintiff in alleging negligence.<sup>417</sup>

Generally it is held that a plea of contributory negligence must set out the facts constituting the negligence,<sup>418</sup>

413. *Hutchings v. Mills Mfg. Co.*, 68 S. C. 512, 47 S. E. 710.

414. *Murray v. Gulf, C. & S. F. R. Co.*, 73 Tex. 2, 11 S. W. 125.

415. *Kile v. Union Elec. L. & P. Co.*, 149 Mo. App. 354, 130 S. W. 89.

416. *Gleason v. Missouri River Power Co.*, 42 Mont. 238, 112 Pac. 394.

417. *Alabama Great Southern R. v. Brock*, 161 Ala. 351. Pleas of contributory negligence held insufficient, see *United States C. I. P. & F. Co. v. Driver*, 162 Ala. 580; *Tallassee Falls Mfg. Co. v. Moore*, 158 Ala. 356; *Mascott Coal Co. v. Garrett*, 156 Ala. 290; *West Pratt Coal Co. v. Andrews*, 150 Ala. 368; *Foley v. Pioneer Min. & Mfg. Co.*, 1441 Ala. 178. Pleas of contributory negligence held sufficient, see *Turner v. Louisville & N. R. Co.*, 162 Ala. 586; *Merriweather v.*

*Sayre Mining & Mfg. Co.*, 161 Ala. 441; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 So. 700; *Osborne v. Alabama Steel & Wire Co.*, 135 Ala. 571, 33 So. 687. Forms of pleas of contributory negligence, set out in full, and held sufficient, see *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441, 445-447; *Woodward Iron Co. v. Lewis*, — Ala. —, 54 So. 566 (violation of rules by servant).

418. *Southern Cotton Oil Co. v. Walker*, 164 Ala. 33; *Western R. of Ala. v. Russell*, 144 Ala. 142, 39 So. 311, 113 Am. St. Rep. 24; *Briggs v. Tennessee, C. I. & R. R. Co.*, 163 Ala. 237; *Huggins v. Southern R. Co.*, 159 Ala. 189; *Alabama Chemical Co. v. Niles*, 156 Ala. 298, 47 So. 239; *Louisville & N. R. Co. v. Markee*, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21. Plea held not to state conclu-

but a plea stating mere conclusions cannot be first attacked on appeal.<sup>419</sup>

A plea of contributory negligence must allege, it has been held, that there was a safer way in which the plaintiff could have discharged his duty and also that he was aware of the danger of the position occupied by him.<sup>420</sup>

A plea that the servant knew, or by the exercise of reasonable care should have known, of the danger, is insufficient, where knowledge must be shown.<sup>421</sup>

A plea that plaintiff was guilty of negligence in failing to discover the alleged defect in an appliance though he would have done so if he had exercised reasonable care is held defective in Alabama, because not alleging facts showing a duty on the part of the servant to inspect or showing that the defect was obvious.<sup>422</sup>

A plea that plaintiff, after discovering the defective condition of a part of a machine, "negligently failed to shut off the steam pressure and failed to use the auxiliaries which would have prevented the injury" was held not open

sions, see *New Connellsville C. & C. Co. v. Kilgore*, 162 Ala. 642. Must state facts and not conclusions. *Tallassee Falls Mfg. Co. v. Moore*, 158 Ala. 356, 48 So. 593; *Southern R. Co. v. Jackson*, 133 Ala. 384, 31 So. 988. Compare *Raunn v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.), 92 S. W. 426, where plea of assumed risk is called plea of contributory negligence. In Nebraska a general allegation of contributory negligence is sufficient unless assailed by a motion to make more definite and certain. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 98 N. W. 358. Plea of negligence in getting on locomotive while in motion is demurrable for failure to more explicitly state the facts. *Creola Lumber Co. v. Mills*, 149 Ala. 474, 42 So. 1019. Disobedience of rules or orders by the in-

jured servant cannot be shown under a general allegation of contributory negligence. *Texas & P. R. Co. v. Magrill*, 15 Tex. Civ. App. 353, 40 S. W. 188.

419. *Kirkpatrick v. St. Louis & S. F. R. Co.*, 159 Fed. 855.

420. *United States Cast Iron P. & F. Co. v. Granger*, 162 Ala. 637, and cases cited. If failure of injured servant to choose a safe place in which to work is relied on, as contributory negligence, the plea must allege that a safe place was apparent or known to him. *Southern R. Co. v. McGowan*, 149 Ala. 440, 43 So. 378.

421. *Jones v. Pioneer Min. & Mfg. Co.*, 149 Ala. 402 [followed in *Lockhart v. Sloss-Sheffield Steel & Iron Co.*, 165 Ala. 516].

422. *Grasselli Chemical Co. v. Davis*, 166 Ala. 471.

to the objection that it was not alleged that a reasonable time within which to turn off steam intervened after the discovery by plaintiff of the defect, since that was necessarily embraced in the averment that after discovery he "negligently" failed, etc.<sup>423</sup>

#### **Causal connection.**

The plea must show the causal connection between the contributory negligence alleged and the injury.<sup>424</sup>

But a plea that "plaintiff did not examine his working place under the rock or place that fell on him before commencing work thereunder, and as a proximate result thereof was thereby hurt. It was the duty of plaintiff before commencing work to examine his working place, and his injury was the proximate result of his failure to perform this duty;" is not subject to the objection that it is a conclusion as to proximate cause.<sup>425</sup>

#### **Violation of rules.**

Where violation of a rule by the injured servant is set up as a defense, the plea must aver knowledge of such rule on the part of defendant,<sup>426</sup> but need not set out the rule violated.<sup>427</sup>

The plea need not negative the habitual violation of the rule, since that is a proper matter for the replication.<sup>428</sup>

#### **Alternative allegations.**

A plea of contributory negligence in going "under or near" the defective roof has been held insufficient because of the alternative allegation.<sup>429</sup>

423. *Pace v. Louisville & N. R. Co.*, 166 Ala. 519.

424. *St. Louis & S. F. R. Co. v. Phillips*, 165 Ala. 504, 51 So. 638; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 So. 700.

425. *Lockhart v. Sloss-Sheffield Steel & Iron Co.*, 165 Ala. 516, 51 So. 627.

426. *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 141, 9 So. 271.

427. *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81, 18 S. W. 188.

428. *Woodward Iron Co. v. Lewis*, — Ala. —, 54 So. 566.

429. *Simmerman v. Hills Creek Coal Co.*, — Ala. —, 54 So. 426.

**In connection with general denial.**

The defense of contributory negligence may be pleaded in an answer which also sets up a general denial of all negligence on the part of the defendant,<sup>430</sup> and hence a plea of contributory negligence need not expressly admit or aver that defendant was also negligent.<sup>431</sup>

**§ 854. Pleading defense of fellow-servants.**

In some jurisdictions, the defense that the injured servant and the negligent servant were fellow-servants cannot be relied on unless specially pleaded.<sup>432</sup>

In other states the defense that the injury was caused by fellow-servants need not be specially pleaded.<sup>433</sup>

However, if the complaint itself shows that plaintiff was injured by the negligence of a fellow-servant, it need not be set up in the answer.<sup>434</sup>

And, of course, if the complaint alleges that the negligent servant held a position making him a vice-principal,

430. *Millan v. Southern Ry. Co.*, 54 S. C. 485, 32 S. E. 539.

431. *Charping v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186 [explaining *Scott v. Seaboard Air-Line Ry.*, 67 S. C. 136, 45 S. E. 129]. In an action for damages upon the ground of defendant's negligence, such negligence is not admitted where the answer denies generally and then pleads contributory negligence on the part of the plaintiff. The plaintiff must, notwithstanding, prove negligence on the part of the master. *George Fowler Sons & Co. v. Brooks*, 65 Kan. 861, 70 Pac. 601. Contributory negligence, when pleaded by itself, is an admission of negligence on the part of the defendant, but not when interposed with the plea of not guilty. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708.

432. *Layng v. Mt. Shasta Min-*

*eral Spring Co.*, 135 Cal. 141, 67 Pac. 48; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 Pac. 89; *O'Brien v. Corra-Rock Island Mining Co.*, 40 Mont. 212, 105 Pac. 724; *Duff v. Willamette Iron & Steel Works*, 45 Or. 479, 78 Pac. 363; *Millen v. Pacific Bridge Co.*, 51 Or. 538, 95 Pac. 196; *Johnson v. Heath*, 5 Neb. (Unof.) 369, 98 N. W. 832. See also *supra*, § 834.

433. *Vinson v. Morning News*, 118 Ga. 655, 45 S. E. 481; *Kaminski v. Tudor Iron Works*, 167 Mo. 462, 67 S. W. 221; *Sheehan v. Prosser*, 55 Mo. App. 569; *Roberts v. Virginia Carolina Chemical Co.*, 84 S. C. 283, 66 S. E. 298; *Wilson v. Charleston & S. R. Co.*, 51 S. C. 79, 28 S. E. 91; *Louisville & N. R. Co. v. Chamblee*, — Ala. —, 54 So. 681. See also *supra*, § 84.

434. *Mann v. O'Sullivan*, 135 Cal. 141, 67 Pac. 48.

defendant may show under a general denial that he was in fact a fellow-servant.<sup>435</sup>

It has been held that it is sufficient to merely allege that the injury was caused by the acts of fellow-servants without going into any details.<sup>436</sup>

But alleging that the injury was caused by plaintiff's own negligence is insufficient as an averment that the injury was caused by the negligence of fellow-servants.<sup>437</sup>

#### IV. REPLY AND SUBSEQUENT PLEADINGS.

##### § 855. Replication or reply.

The necessity for a replication or reply is governed by the general rules of pleading prevailing in the particular jurisdiction. The replication or reply may consist of a general denial or new matter.

It is often interposed, where contributory negligence is pleaded, to show that defendant was negligent after discovery of plaintiff's peril;<sup>438</sup> or that the rule alleged to have been violated was habitually violated; or that plaintiff was acting pursuant to express orders or under an assurance of safety. So where assumption of risk is relied on as a defense, it is often proper or necessary to set up by reply that there was a promise to repair and that

435. *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 472, 59 C. C. A. 269; *Johnson v. Heath*, 5 Neb. (Unof.) 369, 98 N. W. 832.

436. *Cincinnati, N. O. & I. P. Ry. Co. v. Lewallen*, 17 Ky. L. Rep. 863, 32 S. W. 958. A plea that the injuries "were the proximate result of the negligence of his fellow-servant, in that said timber was insecurely and negligently loaded on said bucket, in that it was not tied or fastened, and by reason thereof said timber became loose, causing the injury as aforesaid by falling against or upon plaintiff, as a prox-

imate result of the said negligence of plaintiff's fellow-servant, viz., Coe, in loading said timber," was held not demurrable as failing to allege how the timber proximately caused the injury, or as stating conclusions, or because not giving the name of the fellow-servant. *New Connellsville, C. & C. Co. v. Kilgore*, 162 Ala. 642.

437. *Conlin v. San Francisco & S. J. R. Co.*, 36 Cal. 404.

438. Sufficiency of allegations, see *Ford v. Chicago, R. I. & P. R. Co.*, 106 Ia. 85, 75 N. W. 650.

a reasonable time had not elapsed after the promise and before the injury.<sup>439</sup>

But a replication alleging a promise to remedy the defect is inappropriate as a reply to a plea of contributory negligence as distinguished from a plea of assumed risk.<sup>440</sup>

So a replication is proper to set up an exception in a statute pleaded by defendant as a defense, as for instance, that defendant already had knowledge of the defect which he claims plaintiff should have informed him of.<sup>441</sup>

In the federal courts it is held that a general denial in a replication is sufficient as against pleas of contributory negligence and assumed risk.<sup>442</sup>

The replication should state facts,<sup>443</sup> avoid duplicity, and not be a departure from the complaint. Thus, where the complaint states a cause of action at common law, plaintiff cannot in his reply set up a statutory cause of action.<sup>444</sup>

### § 856. Rejoinders.

Rejoinders are not uncommon in some states, such as Alabama,<sup>445</sup> but in the code states the reply is the last pleading in point of time.

439. *Southern Cotton Oil Co. v. Walker*, 164 Ala. 33, holding replication insufficient because not averring that a reasonable time for making the repairs had not elapsed.

440. *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441.

441. *Alabama Steel & Wire Co. v. Thompson*, 166 Ala. 460.

442. *American Smelting & Refining Co. v. Karapa*, 173 Fed. 607.

443. *Alabama, G. S. R. Co. v. Richie*, 111 Ala. 297, 20 So. 49.

444. *Ham v. St. Louis & S. F. R. Co.*, 149 Mo. App. 200, 130 S. W. 407.

445. See *Southern Cotton Oil Co. v. Walker*, 164 Ala. 33, 52.

## BOOK VI.

### WORKMEN'S COMPENSATION ACTS.

#### § 857. Introductory.

It is not the intention of the author to consider at any length the compensation statutes enacted in some eleven states, most of them within the last year, since there are apparently only four decisions in the United States in relation to any such statutes at the time this is written, and all of those relate to the constitutionality of the particular statute. To review at length the cases decided in England under statutes more or less similar and to point out in detail the differences between the statutes of the various states would require another volume to be added to this work and perhaps would be of little or no value according to whether such statutes are declared to be constitutional or unconstitutional.

#### § 858. Nature of statutes.

These statutes are based on the theory that an employee who is injured while engaged in his work is entitled to compensation from his employer without regard to whether the latter has been guilty of negligence, provided the employee has not been guilty of wilful misconduct. Before the enactment of these statutes, an employer could not be held liable unless guilty of negligence. Under these statutes the question of his negligence is immaterial, except that under some of the statutes the wilful misconduct of the employer gives the injured employee certain additional rights.

#### § 859. Historical: English statutes.

In 1897, a statute was enacted in England, called the Workman's Compensation Act. It enabled an employee, under certain circumstances, to obtain compensation from his employer for personal injuries notwith-

standing the employer was not guilty of any negligence, provided the injury was not due to the employee's "serious and wilful misconduct." This statute provided in detail the employments to which it was applicable, the amount of compensation recoverable, and the procedure to enforce the liability.

The statute, however, was poorly drawn, resulting in a multitude of decisions construing the various provisions thereof. In 1900, the statute was extended so as to cover employers and employees engaged in agriculture. A new statute was passed in 1906 which has since been modified by the Workmen's Compensation Rules enacted in 1907, 1909 and 1910.

These statutes form the basis of those enacted in the United States in the past few years.

#### **§ 860. States which have enacted statutes.**

Statutes of this nature have been enacted in California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Ohio, Washington and Wisconsin.

#### **§ 861. General considerations as to these statutes.**

The first statute of this class enacted in this country appears to have been the New York act which became a law June 25th, 1910.<sup>1</sup> This statute was entitled "An Act to Amend the Labor Law, in Relation to Workmen's Compensation in Certain Dangerous Employments," and it was made applicable only to certain hazardous employments. It fixed the amount of compensation, provided for the mode of settlement of disputes, etc. However, this statute was held unconstitutional by the Court of Appeals of the state of New York in the case of *Ives v. South Buffalo Railway Company* already referred to at some length in the chapter on Fellow-Servants in volume two of this work.<sup>2</sup> This decision was based on the ground that it is not competent to impose upon an employer, who has omitted no legal duty and

1. Laws N. Y. 1910, c. 674.

2. See § —, vol. 2.



has committed no wrong, a liability based solely upon a legislative determination that his business is inherently dangerous. The decision rendered by Justice Werner considers the question at length with great ability and clearness of thought. Chief Justice Cullen added a concurring opinion in which he fully agreed with the opinion of Justice Werner, but states that as to corporations thereafter formed the rule might be different. All the justices concurred in the one opinion or the other.<sup>3</sup>

The statutes of the other states may be classified as (1) those which are mandatory and make the employer liable without regard to his negligence, whether or not he elects to bring himself within their provisions, like the New York statute, and (2) those which are elective and are applicable only to employers and employees filing their assent thereto or otherwise consenting to be bound thereby.

Of the former class may be mentioned the statutes of Nevada and Washington. The Nevada statute,<sup>4</sup> is compulsory so far as the employer is concerned, but it is expressly provided that it is optional with the employee whether to proceed thereunder or to pursue any other remedy. If the New York decision is followed, it seems that this statute will be declared unconstitutional.

In the latter class are included, among others, the statutes in California, Illinois, Kansas, Massachusetts, New Hampshire, New Jersey, Ohio and Wisconsin. Thus, the Kansas statute<sup>6</sup> applies only to employers "who have elected or shall elect before the accident to come within the provision thereof." The California statute has already been referred to and set forth at length in volume two of this work.<sup>7</sup> It comes within the class of statutes making it optional with the employer to bring himself within its provisions and hence it may well be held to be constitutional notwithstanding the courts of

3. *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, revg. 140 App. Div. 921.

4. Laws 1911, c. 183, set out in full at p. 2397.

6. Laws 1911, c. 218, set out in full at p. 2279.

7. § —, vol. 2.

California deem the holding in the New York case to be sound. In New Hampshire,<sup>8</sup> the statute is optional so far as the employer is concerned and the employee has his choice between availing himself of this new statute, or proceeding by action in the same manner as before the enactment of the statute. Contributory negligence, however, is retained as a defense. What has been said about the California statute applies equally well to this statute, so far as its constitutionality is concerned.

**§ 862. Massachusetts statute.**

The Massachusetts statute,<sup>9</sup> set forth in full in the appendix herein, at the outset, in part one, abolishes the defenses of contributory negligence, fellow-servants and assumption of risk, except in so far as such defenses may be interposed in actions to recover damages for personal injuries sustained by "domestic servants and farm laborers," and except when an action is brought against an employer who has agreed to the compensation without negligence plan. It also provides in part one that an employee cannot sue at common law unless he gives notice at the time of his contract of hire that he claims such right, with certain modifications.

In part two of this statute, the question of payments to employees by the association incorporated as a part of such statute, under the name of the Massachusetts Employees' Insurance Association, is legislated upon. Any employer in the commonwealth "*may*" become a subscriber thereto, and subscribers are distributed into groups in accordance with the nature of the business and the degree of the risk of injury, and the subscribers within each group must annually pay such premiums as may be required to pay the compensation therein provided for the injuries which may occur in that year. It will be noticed that the statute is something on the Washington plan except that the latter applies to employers whether they consent thereto or not while the Massachusetts statute is elective both as to employee and

8. Laws 1911, c. 163.

9. Acts 1911, c. 751, p. 998,  
set out in full at p. 2299.

employer. The part of the statute dealing with the insurance association takes effect January 1, 1912, while the balance of the statute does not take effect until July 1, 1912.

The statute also provides, *inter alia*, that notice of the injury must be given within six months, with certain exceptions; that the decision of the industrial accident board shall be enforceable "as if it were a decree of the Superior Court," but "there shall be a right of appeal to the Supreme Judicial Court on questions of law;" that fees of attorneys and physicians under the act shall be subject to the approval of the industrial accident board; that every subscriber, as soon as he secures a policy, shall at once give notice thereof to all his employees; and that an employer may, at his option, procure insurance from a liability insurance company and not join the association.

This Massachusetts statute was submitted by the state senate, before its passage, to the Supreme Judicial Court of that state, for an opinion on the questions whether the bill violated the Fourteenth Amendment of the Federal Constitution and whether it violated the due process of law provision in the state constitution. The court, confining itself to the questions submitted, held that the statute was not unconstitutional. In referring to the New York decision in the Ives case the court say: "There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to. By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employee against him at common law to set up the defense of contributory negligence or assumption of the

risk, or to show that the injury was caused by the negligence of a fellow-servant. In the case of an employee who does not accept the compensation provided for by the act and whose employer had become a subscriber to the association, an action no longer can be maintained for death under the employer's liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. . . . Taking into account the noncompulsory character of the proposed act, we see nothing in any of these provisions which is not 'in conformity with' the Fourteenth Amendment to the Federal Constitution, or which infringes upon any provision of our own constitution in regard to the taking of property 'without due process of law.' It is within the power of the legislature to provide that no agreement by an employee to waive his rights to compensation under the act shall be valid."<sup>10</sup>

§ 863. New Jersey statute.

The New Jersey statute,<sup>11</sup> is also an elective statute. It is divided into two sections, the first relating to "Compensation by Action at Law" and the second to "Elective Compensation." The former, in actions based on the negligence of the employer, abolishes the defenses of fellow-servants and assumption of risk, and changes the defense of contributory negligence so as to make it bar a recovery only where the employee is "wilfully negligent," and places the burden of proving wilful negligence on the defendant. The latter section includes some fifteen subdivisions and provides for compensation to employees irrespective of the negligence of the employer, according to a fixed schedule, except when the injury is intentionally self-inflicted or caused by the intoxication of the injured servant, provided the employer and employee accept the provisions of the act by agreement, either express or implied. This statute provides, however, as to subsequent contracts of hiring,

10. Re Opinion of Justices, 11. Laws 1911, c. 95, set out  
(Mass. July 24, 1911) 96 N. E. 308. in full at p. 2323.

that they "shall be presumed to have been made with reference to the provisions of section 2 of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself, or by written notice from either party to the other, that the provisions of section 2 of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section 2 of this act and have agreed to be bound thereby." Apparently this clause, in so far as it relates to an implied agreement, will be an object of attack on its constitutionality.

**§ 864. Ohio statute.**

In Ohio, a statute was passed in May, 1910,<sup>12</sup> greatly limiting the fellow-servant rule and the defense of assumption of risk, adopting the rule of comparative negligence, limiting the rule as to contributory negligence in case of minors, and fixing the maximum amount of damages recoverable in case of death. This statute is superseded by the Workmen's Compensation Act enacted the following year.

The Ohio statute,<sup>13</sup> enacted in 1911, is also an elective statute, and special attention is called thereto because it is one of the clearest and most easily understood of all this class of statutes so far enacted. Like Washington and Massachusetts, a state insurance fund is created but payments thereto are not compulsory, the statute in that respect being like the Massachusetts statute and different from the Washington statute. The rates of premium are fixed by the state liability board of award; the statute applies to those employing "five or more" workmen; the payment of the premium and giving notice thereof to his employees absolves the employer from common law liability; ninety per cent of the premium is paid by the employer and ten per cent by the employees; if the employer does not pay premiums he is liable at common law except that the defenses

12. Laws 1910, pp. 195-199.

13. Laws 1911, c. 127, set out in full at p. 2336.

of contributory negligence, assumption of risk and fellow-servants are abolished; the common law action in favor of the employee is preserved in certain cases where the employer is guilty of wilful negligence and the like; the amount recoverable is fixed; the right to appeal to the courts is determined; the procedure of the board in determining the damages is set forth; etc.

**§ 865. Washington statute—It is held to be constitutional.**

The Washington statute abolishes the doctrine of negligence as a ground for recovery and is compulsory.<sup>14</sup> In its preamble, it sets forth a declaration of the police power and states that "The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy; and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act." This statute is the most radical of any yet adopted and is the only one of its kind which has been held to be constitutional.

This statute provides that, inasmuch as industry should bear the greater proportion of the burden of the costs of its accidents, each employer engaged in the hazardous employments coming within the act shall, prior to January 15th of each year, pay into the state treasury, in accordance with a schedule provided, a sum equal to a percentage of his total pay roll of that year, pursuant to a classification of the different industries fixing the rate per centum each several class is required to pay. The fund created is termed the "accident" fund and a scheme is provided for replenishing the fund, in case the amount collected shall be insufficient to meet the demands upon it. It is also provided that no em-

14. Laws 1911, c. 74, set out in full at p. 2348.

ployer shall exempt himself from the burdens or waive the benefits of the act by contract. Under this statute employers contribute to an accident fund and the compensation for injuries is paid from such fund, the result being that a careful employer contributes to the payment for injuries sustained by one not his employee but the employee of one who perhaps is a careless employer in the same class of business.

This statute goes further than the New York statute which was declared unconstitutional, and if the Ives case in New York had been followed it would have necessarily been held unconstitutional. But the rule in that case was expressly rejected, and the constitutionality of this Washington statute was decided September 27th, 1911, in favor of the statute by the Supreme Court of that state.<sup>15</sup> The opinion was written by Justice Fullerton, and concurred in by all the justices, there being a separate concurring opinion by Justice Chadwick.

The opinion rendered by Justice Fullerton, after setting forth at length the substance of the statute, takes up the four distinct grounds upon which the constitutionality of the act was challenged, as follows: (1) violation of federal and state constitutional provisions that no person shall be deprived of life, liberty or property without due process of law; (2) violation of federal and state constitutional provisions for equal protection of the laws; (3) violation of provision of state constitution that property shall be taxed according to its value in money and that all taxation shall be equal and uniform; and (4) violation of the constitutional right to trial by jury.

In regard to the first point, it was argued in favor of the unconstitutionality of the act (1) that it created a liability without fault and (2) that it took the property of one employer to pay the obligations of another. It

15. State ex rel. Davis-Smith  
Co. v. Clausen (Wash.), 117 Pac.  
1101.



was held, however, that the fact that the statute creates a liability without a fault does "not furnish an absolute test of the validity of the act," and as illustrating statutes held constitutional although creating liability without fault the court refers to statutes making railroad companies liable, without regard to negligence, for injuries to property caused by fire escaping from their locomotive engines; statutes imposing a liability upon fire insurance agents, based upon the amount of insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen; statutes making a railroad company liable in damages for injuries sustained by a passenger, regardless of the question of negligence on the part of the company; and the Oklahoma Depositors' Guaranty Law authorizing the assessment and collection of a certain per cent on the daily average deposit of each and every bank organized under the laws of the state as a fund to pay the losses caused depositors by failing and insolvent banks, and which was held to be constitutional by the state court and the Supreme Court of the United States.<sup>16</sup>

The court then discusses the police power and holds that although the employments referred to in the statute are lawful callings, and private in their nature, they are subject to the police power and that the statute was a valid regulation to promote the general welfare. It is then held that the act does not unlawfully interfere with the right to contract. Reverting to the police power, it is held that if the statute "has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be utterly unreasonable and so extravagant in nature and purpose as to capri-

16. Noble State Bank v. Haskell, 22 Okla. 48, 94 Pac. 590, aff'd in 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. —, 32 L. R. A. (n. s.) 1062.



ciously interfere with and destroy private rights. That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. . . . That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. . . . The principle has been enacted into law by nearly all the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more South American republics. . . . The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested on this branch of the argument."

The decision further held that the statute was not invalid as class legislation on the ground the fund was to be applied to a certain class of injured employees; that it was in the nature of a license tax and justifiable on the theory of license taxes in general, rather than a general tax within the constitutional provision for equal and uniform taxation; and that it did not unlawfully interfere with the right to trial by jury.<sup>17</sup>

#### § 866. Wisconsin statute.

The Wisconsin statute is in its material features largely the same as the California statute set forth at length in volume two of this work, and applies only to those employers who file a written acceptance of the provisions of the statute with the industrial accident board.<sup>18</sup> This statute, in addition to this compensation plan, cuts off the defenses of assumed risk, and fellow-servants where four or more employees are engaged in the common employment, in ordinary actions not governed

17. On this last point, Justice Chadwick, in his concurring opinion, states that the case is a moot one and therefore he reserves his opinion as to whether the legisla-

ture can take away from the workman his right to trial by jury.

18. Laws 1911, c. 50, set out in full at p. 2379.

by the new compensation plan, except as regards certain employees of a railroad company, the law as to them being unchanged. It will be noticed that this statute (1) regulates and cuts off defenses in ordinary actions against an employer for personal injuries, and (2) as a separate matter, provides for compensation irrespective of negligence on an elective basis.

This Wisconsin statute has been held constitutional in a decision rendered by the supreme court of Wisconsin in the case of *Borgnis against Falk Co. of Milwaukee*, in November, 1911 (Wis.), 133 N. W. 209. Among other things decided therein is that the act is not unconstitutional as vesting judicial powers in the industrial commission, that a constitutional statute cannot be contrary to public policy; that depriving employers of the defenses of assumed risk and fellow-servants is within the legislative power; that the act does not make an unjust discrimination, nor is it invalid on the ground of coercion; that the act is not invalid as a deprivation of property without due process of law nor on the ground of raising money by taxation for a purpose not public nor as impairing vested or contract rights of employees then in the service.

**§ 867. Indiana statute.**

Indiana has no statute creating liability irrespective of negligence, but since the chapter on Fellow-Servants was written and printed attention has been called to the 1911 statute in that state,<sup>19</sup> which seems to abolish the rule of fellow-servants where the master employs five or more servants in his business and which limits the defenses of assumption of risk and of contributory negligence.

**§ 868. The present outlook for new legislation and the effect thereof.**

There is undoubtedly a strong sentiment in favor of legislation that will work a change in the present method of adjusting the liability of employers to employees for

19. Laws 1911, c. 88.

personal injuries sustained in the employment. The Commissioners on Uniform State Laws, made up of lawyers appointed by the governors of the various states, have framed a tentative act upon what is called an elective basis, requiring the assent of both employer and employee before it shall take effect as to either of them.

The Congress of the United States is also at the present time discussing a bill to modify the Interstate Commerce Act as applied to employees engaged in interstate commerce, so as to make the employers liable irrespective of negligence, in line with these statutes already referred to.

Undoubtedly the year 1912 will add several other states to the list of those which have already enacted such statutes. It is the opinion of the author that the decision in New York in regard to the constitutionality of the statute in that state is fundamentally correct and that statutes which leave the employer no choice but makes him liable even although there has been no negligence on his part cannot be sustained under our form of government. At the same time, it would seem that a statute making it optional with the employer to come within its provisions by filing a written assent thereto revocable at any time, is constitutional at least in so far as the employer is concerned. If such a class of statutes are enacted in the next few years, in addition to those now in force, and they are held to be constitutional, it will mean that there will be two modes of procedure in each state; the one as it exists today independent of such statutes where the employer or employee does not elect to come within the terms of such statutes, and the other according to the new system under which negligence of the employer is not an element. It has been suggested that employers will be loath to assent to the provisions of the new statutes but undoubtedly many benefits will accrue to them by accepting such provisions, as for instance the limitation on

**§ 869. Appendix.**

the amount recoverable, the provisions for payment in installments, etc. And furthermore under the old system the defenses which may be interposed by an employer are constantly being curtailed and under most of these new statutes the defenses of assumption of risk and fellow-servants are absolutely abolished and the defense of contributory negligence abolished or greatly limited.

Attention is called to the appendix immediately following, which contains the full text of all the Workmen's Compensation Acts enacted at this time, except the California statute which was set forth at length in volume two, and the New York statute which was declared unconstitutional.

Some of the more important matters in such statutes have been emphasized by the use of italics.

## APPENDIX.

### THE TEXT OF ALL THE WORKMEN'S COMPENSATION ACTS ENACTED UP TO AND INCLUDING THE LEGISLATIVE SESSION OF 1910-1911.

#### § 870. California statute.

The California statute has been set forth at great length in volume two of this work.<sup>1</sup>

#### § 871. Kansas statute (Laws 1911, c. 218, p. 382).

An Act to provide compensation for workmen injured in certain hazardous industries.

Section 1. THE OBLIGATION. If in any employment to which this act applies, personal injury by accident arising out of and *in the course of employment* is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act. Save as herein provided, no such employer shall be liable for any injury for which compensation is recoverable under this act; provided, that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he is employed; (b) if it is proved that the *injury to the workman results from his deliberate intention to cause injury, or from his wilful failure to use a guard or protection against accident required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his deliberate breach of statutory regulations affecting safety of life or limb, or from his intoxication*, any compensation in respect to that injury shall be disallowed.

1. Vol. 2, pp. —.

Section 2. RESERVATION OF LIABILITY FOR WRONG OR NEGLIGENCE IN CERTAIN CASES. Where the injury was approximately caused by the individual negligence, either of commission or omission, of the employer, including such negligence of the directors or of any managing officer or managing agent of such employer if a corporation, or of any of the partners if such employer is a partnership, or of any member if such employer is an association, but excluding the negligence of competent employees in the performance of their duties or of the employer's duty delegated to them, *the existing liability of the employer shall not be affected by this act*, but in such case the injured workman, or if death results from such injury, his dependents as herein defined, if they unanimously agree, otherwise his legal representative, *may elect between any right of action against the employer upon such liability and the right to compensation under this act.*

Section 3. RESERVATION OF PENALTIES. Nothing in this act shall affect the liability of the employer or employee to a fine or penalty under any other statute.

Section 4. SUBCONTRACTING. (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

(b) Where the principal is liable to pay compensation under this section, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of this section, and shall have a cause of action therefor.

(c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, or in, or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of such work under his control or management.

(e) A principal contractor, when sued by a workman of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation voluntarily to a workman of a subcontractor shall have the right to recover over against the subcontractor.

Section 5. REMEDIES BOTH AGAINST EMPLOYER AND STRANGER. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability against some person other than the employer to pay damages in respect thereof. (a) The workman may take proceedings against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and (b) if the workman has recovered compensation under this act, the person by whom the compensation was paid, or any person who has been called on to indemnify him under this section of this act relating to subcontracting, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the workman to recover damages therefor.

Section 6. APPLICATION OF THE ACT. *This act shall apply only to employment in the course of the employer's*

*trade or business on, in, or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant and all employment wherein a process requiring the use of dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workmen engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. This act shall not apply in any case where the accident occurred before this act takes effect, and all rights which have accrued, by reason of any such accident, at the time of the publication of this act, shall be saved the remedies now existing therefor, and the court shall have same power as to them as if this act had not been enacted.*

Section 7. This act shall not be construed to apply to business or employment which, according to law, are so engaged in *interstate commerce* as not to be subject to the legislative power of the state, nor to persons injured while they are so engaged.

Section 8. It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. *This act, therefore, shall only apply to employers by whom fifteen or more workmen have been (employed) continuously for more than one month at the time of the accident and who have elected or shall elect before the accident to come within the provisions hereof; provided, however, that employers having less than fifteen workmen may elect to come within the provisions of this act in which case his employees shall be included herein, as hereinafter provided.*

Section 9. DEFINITIONS. In this act, unless the context otherwise requires: (a) "*Railway*" includes street



railways and interurbans; and "employment on railways" includes work in depots, power houses, round-houses, machine shops, yards, and upon the right of way, and in the operation of its engines, cars, and trains, and to employees of express companies while running on railroad trains. (b) "*Factory*" means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing, or renovating any article or articles for the purpose of trade or gain or of the business carried therein, including expressly any brick-yard, meat-packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant and water power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant. (c) "*Mine*" means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries and tunnels, and other ways, cuts and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the opening of the mine, and any adjoined adjacent work place where the material from a mine is prepared for use or shipment. (d) "*Quarry*" means any place, not a mine, where stone, slate, clay, sand, gravel, or other solid material is dug or otherwise extracted from the earth for the purpose of trade or bargain or of the employer's trade or business. (e) "*Electrical work*" means any kind of work in or directly connected with the construction, installation, operation, alteration, removal or repair of wires, cables, switchboards or apparatus, used for the transmission of electrical current. (f) "*Building work*" means any work in the erection, construction, extension, decoration, alteration, repair or demolition of any building or structural appurtenance. (g) "*Engineering work*" means any work in the construction, alteration, extension, repair or demolition of a railway (as hereinbefore defined) bridge,

jetties, dike, dam, reservoir, underground conduit, sewer, oil or gas well, oil tank, gas tank, water tower, or water works (including standpipes or mains), any caisson work or work in artificially compressed air, any work in dredging, pile driving, moving buildings, moving safes, or in laying, repairing or removing underground pipes and connections, the erection, installing, repairing, or removing of boilers, furnaces, engines and power machinery (including belting and other connections), and any work in grading or excavating where shoring is necessary or power machinery or blasting powder, dynamite or other high explosives is in use (excluding mining and quarrying). (h) "*Employer*" includes any person or body of persons corporate or unincorporate, and the legal representatives of a deceased employer or the receiver or trustee of a person, corporation, association, or partnership. (i) "*Workman*" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer's trade or business. Any reference to a workman who has been injured, shall, where the workman is dead, include a reference to his dependents, as hereinafter defined, or to his legal representatives, or where he is a minor or incompetent, to his guardian. (j) "*Dependents*" means such members of the workman's family as are wholly or in part dependent upon the workman at the time of the accident. And "*members of family*" for the purpose of this act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then parents and grandparents, or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section parents include step-parents, children include step-children, and grandchildren include step-grandchildren, and brothers and sisters include step-brothers and step-sisters, and children and parents include that relation by legal adoption.

**Section 10. INCOMPETENCY OF WORKMAN.** In case an injured workman is mentally incompetent or a minor, or where death results from the injury, in case any of his dependents as herein defined is mentally incompetent or a minor, at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run so long as such incompetent or minor has no guardian.

**Section 11. AMOUNT OF COMPENSATION.** The amount of compensation under this act shall be, (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars, provided, such earnings shall be computed upon the basis of the scale which he received or would have been entitled to receive had he been at work, during the thirty days next preceding the accident; and, if the period of the workman's employment by the said employer had been less than one year, then the amount of his earnings during the said year shall be deemed to be fifty-two times his average weekly earnings during the period of his actual employment under said employer; provided, that the amount of any payment made under this act and any lump sum paid hereunder for such injury from which death may thereafter result shall be deducted from such sum; and provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case seven hundred and fifty dollars. (2) If the workman does not leave any such dependents, but leaves any dependents, in part dependent upon his earnings, such proportion of the amount payable under the foregoing provisions of this section, as may be agreed upon or determined to be proportionate to the injury to the

said dependent; and (3) If he leaves no dependents, the reasonable expense of his medical attendance and burial, not exceeding one hundred dollars. (b) Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to fifty per cent of his average weekly earnings computed as provided in section 12, but in no case less than six dollars per week or more than fifteen dollars per week. (c) When partial incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, shall not be less than twenty-five per cent, nor exceeding fifty per cent, based upon the average weekly earnings computed as provided in section 12, but in no case less than three dollars per week or more than twelve dollars per week; provided, however, that if the workman is under twenty-one years of age at the date of the accident and the average weekly earnings are less than ten dollars his compensation shall not be less than seventy-five per cent of his average earnings. No such payment for total or partial disability shall extend over a period exceeding ten years.

Section 12. RULE FOR COMPENSATION. For the purposes of the provisions of this act relating to "earnings" and "average earnings" of workman, the following rules shall be observed: (a) "*Average earnings*" shall be computed in such manner as is best calculated to give the average rate per week at which the workman was being remunerated for the fifty-two weeks prior to the accident. Provided, that where by reason of the shortness of time during which the workman has been in the employment of his employer, or the casual nature or the terms of the employment, it is impracticable to compute the rate of remuneration, regard shall be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person employed, by a person in the same grade employed in the same class

of employment and in the same district. (b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his "earnings" and his "average earnings" shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. (c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by his absence of work due to illness or any other unavoidable cause. (d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed upon by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. (e) In fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity. (f) In the case of partial incapacity the payments shall be computed to equal, as closely as possible, fifty per cent of the difference between the amount of the "average earnings" of the workman before the accident, to be computed as herein provided, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, subject however, to the limitations hereinbefore provided.

**Section 13. PAYMENTS TO THE INJURED WORKMAN.** The payments shall be made at the same time, place and in the same manner as the wages of the workman were payable at the time of the accident, but a judge of any district court having jurisdiction upon the application of either party may modify such regulation in a particular case as to him may seem just.

**Section 14. COMPENSATION TO DEPENDENTS, ETC.** Where death results from the injury and the dependents of the deceased workman as herein defined, have agreed

to accept compensation, and the amount of such compensation and the apportionment thereof between them has been agreed to or otherwise determined, the employer may pay such compensation to them accordingly (or to an administrator if one be appointed) and thereupon be discharged from all further liability for the injury. Where only the apportionment of the agreed compensation between the dependents is not agreed to, the employer may pay the amount into any district court having jurisdiction, or to the administrator of the deceased workman, with the same effect. Where the compensation has been so paid into court or to an administrator, the proper court, upon the petition of such administrator or any of such dependents, and upon such notice and proof as it may order shall determine the distribution thereof among such dependents. Where there are no dependents, medical and funeral expenses may be paid and distributed in like manner.

Section 15. *The payments due under this act, as well as any judgment obtained thereunder, shall not be assignable or subject to levy, execution or attachment, except for medicine, medical attention and nursing and no claim of any attorney-at-law for services rendered in securing such indemnity or compensation or judgment shall be an enforceable lien thereon, unless the same has been approved in writing by the judge of the court where said case was tried; but if no trial was had, then by any judge of the district court of this state to whom such matter has been regularly submitted, on due notice to the party and parties in interest of such submission.*

Section 16. **REPORTS AS TO ACCIDENTS AND COMPENSATION.** Employers affected by this act shall report annually to the state commissioner and factory inspector such reasonable particulars in regard thereto as he may require, including particulars as to all releases of liability under this act and any other law. The penalty for failure to report or for false report shall invalidate any such release of liability.

Section 17. MEDICAL EXAMINATION. (a) After an injury to the employees, if so requested by his employer, the employee must submit himself for examination at some reasonable time to a reputable physician selected by the employer, and from time to time thereafter during the pendency of his claim for compensation, or during the receipt by him for payment under this act, but he shall not be required to so submit himself, more than once in two weeks unless in accordance with such orders as may be made by the proper court or judge thereof. Either party may upon demand require a report of any examination made by the physician of the other party upon payment of a fee of one dollar therefor. (b) If the employees request he shall be entitled to have a physician of his own selection present at the time to participate in such examinations. (c) Unless there has been a reasonable opportunity thereafter for such physician selected by the employee to participate in the examination in the presence of the physician selected by the employer, the physician selected by the employer shall not be permitted afterwards to give evidence of the condition of the employee in a dispute as to the injury. (d) Except as provided herein in this act there shall be no other disqualification or privilege preventing the testimony of a physician who actually makes an examination.

Section 18. MEDICAL EXAMINATION BY NEUTRAL PHYSICIAN. In case of a dispute as to the injury, the committee, or arbitrator as hereinafter provided, or the judge of the district court shall have the power to employ a neutral physician of good standing and ability, whose duty it shall be, at the expense of the parties to make an examination of the injured person, as the court may direct, on the petition of either or both the employer and the employee or dependents.

Section 19. TESTIMONY BY COURT PHYSICIAN. If the employer or the employee has a physician make such an examination and no reasonable opportunity is given to the other party to have his physician make an exami-



nation, then, in case of a dispute as to the injury, the physician of the party making such examination shall not give evidence before the court unless a neutral physician either has examined or then does examine the injured employee and give testimony regarding the injuries.

Section 20. REFUSAL OF MEDICAL EXAMINATION. If the employee shall refuse examination by physician selected by the employer, with the presence of a physician of his own selection, and shall refuse an examination by the physician appointed by the court, he shall have no right to compensation during the period from refusal until he, or some one in his behalf, notifies the employer or the court that he is willing to have such examination.

Section 21. CERTIFICATE OF PHYSICIAN. A physician making an examination shall give to the employer and to the workman a certificate as to the condition of the workman, but such certificate shall not be competent evidence of that condition unless supported by his testimony if his testimony would have been admissible.

Section 22. NOTICE AND CLAIM. Proceedings for recovery of compensation under this act shall not be maintainable unless *written notice of the accident, stating the time, place, and particulars thereof*, and the name and address of the person injured, has been given *within ten days after the accident*, and unless a claim for compensation has been made within six months after the accident, or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity or other reasonable cause, the failure to make a claim within the period above specified shall not be a bar, if such failure was occasioned by a mistake, physical or mental incapacity or other reasonable cause..



Section 23. AGREEMENTS. Compensation due under this act may be settled by agreement. Every such agreement, other than a release, shall be in the form hereinafter provided.

Section 24. ARBITRATIONS. If compensation be not so settled by agreement: (a) If any committee representative of the employer and the workman exists, organized for the purpose of settling disputes under this act, the matter shall, unless either party objects by notice in writing delivered or sent by registered mail to the other party before the committee meets to consider the matter, be settled in accordance with its rules by such committee or by an arbitrator selected by it; (b) If either party so objects, or there is no such committee, or the committee or the arbitrator to whom it refers the matter fails to settle it within sixty days from the date of the claim, the matter may be settled by a single arbitrator agreed upon by the parties, or appointed by any judge of a court where an action might be maintained. The consent to arbitration shall be in writing and signed by the parties and may limit the fees of the arbitrator and the time within which the award must be made. And unless such consent and the order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue.

Section 25. THE DUTIES OF ARBITRATOR. The arbitrator shall not be bound by technical rules of procedure or evidence, but shall give the parties reasonable opportunity to be heard and act reasonably and without partiality. He shall make and file his award, with the consent to arbitration attached in the office of the clerk of the proper district court within the time limited in the consent, or if no time limit is fixed thereon, within sixty days after his selection, and shall give notice of such filing to the parties by mail.

Section 26. ARBITRATOR'S FEES. The arbitrator's fees shall be fixed by the consent to arbitration or be agreed to by the parties before the arbitration, and if

not so fixed or agreed to, they shall not exceed ten dollars per day, for not to exceed ten days and disbursements for expense. The arbitrator shall tax or apportion the costs of such fees in his discretion and shall add the amount taxed or apportioned against the employer to the first payment made under the award, and he shall note the amount of his fees on the award and shall have a lien therefor on the first payments due under the award.

**Section 27. FORM OF AGREEMENTS AND AWARD.** Every agreement for compensation and every award shall be in writing, signed and acknowledged by the parties or by the arbitrator or secretary of the committee hereinbefore referred to, and shall specify the amount due and unpaid by the employer to the workman up to the date of the agreement or award, and, if any, the amount of the payments thereafter to be paid by the employer to the workman and the length of time such payments shall continue.

**Section 28. FILING AGREEMENTS, AWARDS, ETC.** It shall be the duty of the employer to file or cause to be filed every release of liability hereunder, every agreement for or award of compensation, or modifying an agreement for or award of compensation, under this act, if not filed by the committee or arbitrator, to which he is a party, or a sworn copy thereof, in the office of the district court in the county in which the accident occurred within sixty days after it is made, otherwise it shall be void as against the workman. The said clerk shall accept, receipt for, and file any such release, agreement or award, without fee, and record and index it in the book kept for that purpose. Nothing herein shall be construed to prevent the workman from filing such agreement or award.

**Section 29. AGREEMENTS AND AWARDS—WHEN CANCELED.** At any time within one year after an agreement or award has been so filed, a judge of a district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just, if it be shown to his satisfaction that the workman has returned to work and is earning ap-

proximately the same or higher wages as or than he did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employee absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada.

Section 30. STAYING PROCEEDINGS UPON AGREEMENT OR AWARD. At any time after the filing of an agreement or award and before judgment has been granted thereon, the employer may stay proceedings thereon by filing in the office of the clerk of the district court wherein such agreement or award is filed: (a) A proper certificate of a qualified insurance company that the amount of the compensation to the workman is insured by it; (b) A proper bond undertaking to secure the payment of the compensation. Such certificate or bond shall first be approved by a judge of the said district court.

Section 31. JUDGMENT UPON AGREEMENT OR AWARD. At any time after an agreement or award has been filed the workman may apply to the said district court for judgment against the employer for a lump sum equal to eighty per cent of the amount of payments due and unpaid and prospectively due under the agreement or award; and, unless the agreement or award be stayed, modified or canceled, or the liability thereunder be redeemed or otherwise discharged, the court shall examine the workman under oath, and if satisfied that the application is made because of doubt as to the security of his compensation, shall compute the sum and direct judgment accordingly, as if in an action; provided, that if the employer shall give a good and sufficient bond, approved by the court, no execution shall issue on such judgment so long as the employer continues to make payments in accordance with the original agreement or award undiminished by the discount.

**Section 32. REVIEW OR MODIFICATION OF AGREEMENT OR AWARD.** An agreement or award may be modified at any time by a subsequent agreement; or, at any time after one year from the date of filing; it may be reviewed, upon the application of either party on the ground that the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided.

**Section 33. REDEMPTION OF LIABILITY.** Where any payment has been continued for not less than six months the liability therefor may be redeemed by the employer by the payment to the workman of a lump sum of an amount equal to eighty per cent of the payments which may become due according to the award, such amount to be determined by agreement, or, in default thereof, upon application, to a judge of a district court having jurisdiction. Upon paying such amount the employer shall be discharged from all further liability on account of the injury, and be entitled to a duly executed release, upon filing which or other due proof of payment, the liability upon any agreement or award shall be discharged of record.

**Section 34. INSURANCE.** Where the payment of compensation to the workman is insured, by a policy or policies, at the expense of the employer, the insurer shall be subrogated to the rights and duties under this act of the employer, so far as appropriate.

**Section 35. COURTS.** All references hereinbefore to a district court of the state of Kansas having jurisdiction of a civil action between the parties shall be construed as relating to the then existing code of civil procedure. Such court shall make all rules necessary and appropriate to carry out the provisions of this act.

Section 36. ACTIONS. *A workman's right to compensation under this act, may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar, demand a jury trial. The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payment overdue, or, in the discretion of the trial judge, for periodical payments as in an award. Where death results from injury, the action shall be brought by the dependent or dependents entitled to the compensation or by the legal representative of the deceased for the benefit of the dependents as herein defined; and in such action the judgment may provide for the proportion of the award to be distributed to or between the several dependents; otherwise such proportions shall be determined by the proper probate court. An action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation under this act. No action or proceeding provided for in this act shall be brought or maintained outside of the state of Kansas, and notice thereof may be given by publication against nonresidents of the state in the manner now provided by article 7 of chapter 95, General Statutes of Kansas of 1909, so far as the same may be applicable and by personal service of a true copy of the first publication within twenty-one days after the date of the said first publication unless excused by the court upon proper showing that such service cannot be made.*

Section 37. WHEN THE CAUSE OF ACTION ACCRUES. The cause of action shall be deemed in every case, including a case where death results from the injury, to have accrued to the injured workman at the time of the accident; and the time limited in which to commence an

action for compensation therefor shall run as against him, his legal representatives and dependents from that date.

Section 38. ATTORNEY'S LIENS. Contingent fees of attorneys for services and proceedings under this act shall in every case be subject to the approval by the court.

Section 39. CERTIFICATE REQUIRED. If the superintendent of insurance by and with the advice and written approval of the attorney general certifies that any scheme of compensation, benefit or insurance for the workmen of an employer in any employment to which this act applies, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workman, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workman would have been entitled under this act or their equivalents, the employer, may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act; and thereupon the employer shall be liable only in accordance with the scheme; but, save as aforesaid, this act shall not apply notwithstanding any contract to the contrary made after this act becomes law.

Section 40. CONDITIONS OF CERTIFICATE. No scheme shall be so certified which does not contain suitable provisions for the equitable distribution of any moneys or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already accrued, if and when such certificate is revoked or the scheme otherwise terminated.

Section 41. CERTIFICATE TO BE REVOCABLE. If at any time the scheme no longer fulfills the requirements of this article, or is not fairly administered, or other valid and substantial reasons therefor exist, the super-

intendent of insurance by and with the attorney general shall revoke the certificate and the scheme shall thereby be terminated.

Section 42. INFORMATION TO BE REPORTED. Where a certified scheme is in effect the employer must answer all such inquiries and furnish all such accounts in regard thereto as may be required by the superintendent.

Section 43. The superintendent of insurance may make all rules and regulations necessary to carry out the purposes of the four proceeding sections.

Section 44. *All employers as defined by this act who shall elect to come within the provisions of this act and of all acts amendatory hereof shall do so by filing a statement to such effect with the secretary of state of this state at any time after taking effect of this act, which election shall be binding upon such employer for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or of any succeeding year, file in the office of the secretary of state a notice in writing to the effect that he withdraws his election to be subject to the provisions of this act. Notice of such election or withdrawal shall be forthwith posted by such employer in conspicuous places in and about his place of business.*

Section 45. *Every employee entitled to come within the provisions of this act, shall be presumed to have done so unless he serve written notice, before injury, upon his employer that he elects not to accept thereunder and thereafter any such employee desiring to change his election shall only do so by serving written notices thereof upon his employer. Any contract wherein an employer requires of an employee as a condition of employment that he shall elect not to come within the provisions of this act shall be void.*

Section 46. *In any action to recover damages for a personal injury sustained within this state by an employee (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death result-*



ing from personal injury so sustained, in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, where such employer is within the provisions hereof, it shall not be a defense of any employer (as herein in this act defined) who shall not have elected, as herein before provided, to come within the provisions of this act; (a) *That the employee either expressly or impliedly assumed the risk of the hazard complained of;* (b) *that the injury or death was caused in whole or in part by the want of due care of a fellow-servant;* (c) *that such employee was guilty of contributory negligence but such contributory negligence of said employee shall be considered by the jury in assessing the amount of recovery.*

Section 47. In an action to recover damages for a personal injury sustained within this state by an employee (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, and where such employer has elected to come and is within the provisions of this act as hereinbefore provided, it shall be a defense for such employer in all cases where said employee has elected not to come within the provisions of this act; (a) *That the employee either expressly or impliedly assumed risk of the hazard complained of;* (b) *that the injury or death was caused in whole or in part by the want of due care of a fellow-servant;* (c) *that the said employee was guilty of contributory negligence, provided, however, that none of these defenses shall be available where the injury was caused by the wilful or gross negligence of such employer, or of any managing officer, or managing agent of said employer or where under the law existing at the time of the death or injury such defenses are not available.*

Section 48. Nothing in this act shall be construed to amend or repeal section 6999 of the General Statutes of Kansas of 1909, or House bill No. 240 of the session of 1911, the same being "An act relating to the liability of



common carriers by railroads to their employees in certain cases and repealing all acts and parts of acts so far as the same are in conflict herewith."

Section 49. This act shall take effect and be in force from and after its publication in the statute book, and the first day of January, 1912.

Approved March 14, 1911.

§ 872. Massachusetts statute, (Laws 1911, c. 751.)

An act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries.

Be it enacted, etc., as follows:

PART I.

MODIFICATION OF REMEDIES.

Section 1. *In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:*

- 1. That the employee was negligent;*
- 2. That the injury was caused by the negligence of a fellow employee;*
- 3. That the employee had assumed the risk of the injury.*

Section 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

Section 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber.

Section 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not apply to employees of a subscriber while this act is in effect.

Section 5. *An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time if his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent.*

## PART II.

### PAYMENTS.

Section 1. If an employee who has not given notice of his claim of common law rights of action, as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury.

Section 2. *If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation.*

Section 3. *If the employee is injured by reason of the serious and wilful misconduct of a subscriber or any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employee.*

Section 4. No compensation shall be paid under this act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period

of two weeks, compensation shall begin on the fifteenth day after the injury.

Section 5. During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed.

Section 6. *If death results from the injury*, the association shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

Section 7. *The following persons shall be conclusively presumed to be wholly dependent* for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death.

(b) A husband upon a wife with whom he lives at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

Section 8. If the employee leaves no dependents, the association shall pay the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.

Section 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to one half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than three thousand dollars.

Section 10. *While the incapacity for work resulting from the injury is partial*, the association shall pay the injured employee a weekly compensation equal to one half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury.

Section 11. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensation:

(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the entire and irrecoverable loss of the sight of both eyes, one half of the average weekly wages of the injured person, but not more

than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the entire and irrecoverable loss of the sight of either eye, one half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks.

(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks.

(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks.

Section 12. No savings or insurance of the injured employee, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the association be considered in fixing the compensation under this act.

Section 13. The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act.

Section 14. If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

Section 15. No proceedings for compensation for an injury under this act shall be maintained unless a *notice of the injury* shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

Section 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representatives or by a person in his behalf.

Section 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber, if there are more subscribers than one, or upon any officer or agent of a corporation if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

Section 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury.

Section 19. After an employee has given notice of an injury, as provided by this act, and from time to time thereafter during the continuance of his disability he shall, if so requested by the association, *submit himself to an examination by a physician or surgeon authorized to practice medicine* under the laws of the commonwealth,

furnished and paid for by the association. The employee shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

Section 20. *No agreement by an employee to waive his rights to compensation under this act shall be valid.*

Section 21. *No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts.*

Section 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases be *redeemed by the payment of a lump sum* by agreement of the parties, subject to the approval of the industrial accident board.

### PART III.

#### PROCEDURE.

Section 1. There shall be an *industrial accident board* consisting of three members, to be appointed by the governor, by and with the advice and consent of the council, one of whom shall be designated by the governor as chairman. The term of office of members of this board shall be six years, except that when first constituted one member shall be appointed for two years, one for four years, and one for six years. Thereafter one member shall be appointed every second year for the full term of six years.

Section 2. The salaries and expenses of the board shall be paid by the commonwealth. The salary of the chairman shall be sixty-five hundred dollars a year, and the salary of the other members shall be six thousand dollars a year each. The board may appoint a secretary at a salary of not more than three thousand dollars a year, and may remove him. It shall also be allowed an annual sum, not exceeding ten thousand dollars, for



clerical service, and traveling and other necessary expenses. The board shall be provided with an office in the state house or in some other suitable building in the city of Boston, in which its records shall be kept.

Section 3. *The board may make rules* not inconsistent with this act for carrying out the provisions of the act. *Process and procedure* under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to *subpoena witnesses* and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Section 4. If the association and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the industrial accident board and, if approved by it, thereupon the *memorandum shall for all purposes be enforceable as a decree of the superior court*. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

Section 5. If the association and the injured employee *fail to reach an agreement* in regard to compensation under this act, either party may notify the industrial accident board who shall thereupon call for the formation of a *committee of arbitration*. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named, respectively, by the two parties.

Section 6. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification, as above provided, the board or any member thereof shall fill the vacancy and notify the parties to that effect.



Section 7. The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the place where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall be enforceable as if it were a decree of the superior court.

Section 8. The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service, shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

Section 9. The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the association, which shall deduct an amount equal to one third of the sum from any compensation found due the employee.

Section 10. If a claim for a review is filed, as provided in Part III, section seven, the board shall hear the parties and file its decision with the records of the proceedings.

Section 11. *There shall be a right of appeal to the supreme judicial court on questions of law*, and the industrial accident board may report questions of law to the supreme judicial court for its determination.

Section 12. *Any weekly payment under this act may be reviewed* by the industrial accident board at the request of the association or of the employee; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employee warrants such action.

Section 13. *Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.*

Section 14. If the committee of arbitration, industrial accident board, or any court before whom any proceedings are brought under this act determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole *cost of the proceedings* upon the party who has so brought, prosecuted or defended them.

Section 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both; and if compensation be paid under this act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person.

Section 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board. The decisions of the industrial accident board shall for all purposes be enforceable as if they were decrees of the superior court.

Section 17. If a subscriber enters into a contract, written or oral, with an *independent contractor* to do such subscriber's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or sub-contractors were subscribers. The association, however, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section, and if the association has paid com-

pensation under the terms of this section, it may enforce in the name of the employee, or in its own name, and for the benefit of the association, the liability of such other person. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber.

Section 18. *Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for the purpose.*

Upon the termination of the disability of the injured employee or, if such disability extends beyond a period of sixty days, at the expiration of such period the employer shall make a *supplemental report* on blanks to be procured from the board for that purpose.

The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the board.

Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offence.

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PART IV.

## THE MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION.

Section 1. The *Massachusetts Employees Insurance Association* is hereby created a body corporate with the powers provided in this act and with all the general corporate powers incident thereto.

Section 2. The governor shall appoint a board of directors of the association, consisting of fifteen members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws provide.

Section 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

Section 4. The board of directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

Section 5. Seven or more of the directors shall constitute a quorum for the transaction of business.

Vacancies in any office may be filled in such manner as the by-laws shall provide.

Section 6. *Any employer in the commonwealth may become a subscriber.*

Section 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

Section 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employees to whom the association is bound to pay compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employees to whom the

association is bound to pay compensation, but no subscriber shall cast, by his own right or by the right of proxy, more than twenty votes.

Section 9. No policy shall be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employees to whom the association may be bound to pay compensation.

Section 10. No policy shall be issued until a list of the subscribers, with the number of employees of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policies subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

Section 11. If the number of subscribers falls below one hundred, or the number of employees to whom the association may be bound to pay compensation falls below ten thousand, *no further policies shall be issued* until other employers have subscribed who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employees, said subscriptions to be subject to the provisions contained in the preceding section.

Section 12. Upon the filing of the certificate provided for in the two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

Section 13. The board of directors shall *distribute the subscribers into groups* in accordance with the nature of the business and the degree of the risk of injury.

Subscribers within each group shall *annually pay in cash, or notes absolutely payable, such premiums as may be required to pay* the compensation herein provided for the injuries which may occur in that year.

Section 14. The association may in its by-laws and policies fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

Section 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an *assessment* for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability.

Every subscriber shall pay his proportional part of any assessments which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

Section 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred.

All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

Section 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the insurance department and shall not take effect until approved by the insurance commissioner after such investigation as he may deem necessary.

Section 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours.

Any subscriber or employee aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

Section 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

Section 20. *Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees by the association.*

Section 21. Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association.

Section 22. If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay to an employee any damages on account of personal injury sustained by such employee during the period of subscription, *the association shall pay to the subscriber the full amount of such judgment* and the cost assessed therewith, if the subscriber shall have given the association notice in writing of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend the same.

Section 23. The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

Section 24. The board of directors appointed by the governor under the provisions of Part IV, section two, may incur such expenses in the performance of its duties as shall be approved by the governor and council. Such expenses shall be paid from the treasury of the commonwealth and shall not exceed in amount the sum of fifteen thousand dollars.



## PART V.

## MISCELLANEOUS PROVISIONS.

Section 1. If an employee of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a *release to the subscriber* of all claims or demands at law, if any, arising from the injury.

Section 2. The following words and phrases, as used in this act, shall, unless a different meaning is plainly required by the context, have the following meaning:

“*Employer*” shall include the legal representative of a deceased employer.

“*Employee*” shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

“*Dependents*” shall mean members of the employee’s family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.

“*Average weekly wages*” shall mean the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks’ time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to



compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

*"Association"* shall mean the Massachusetts Employees Insurance Association.

*"Subscriber"* shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV, section twelve.

Section 3. *Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this act, and a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association.*

Section 4. Sections one hundred and thirty-six to one hundred and forty, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine are hereby repealed.

Section 5. The provisions of this act shall not apply to injuries sustained prior to the taking effect thereof.

Section 6. Part IV of this act shall take effect on the *first day of January, nineteen hundred and twelve*; the remainder thereof shall take effect on the *first day of July, nineteen hundred and twelve*. [Approved July 28, 1911.]

§ 873. New Hampshire statute (Laws 1911, c. 163, p. 181).

AN ACT IN RELATION TO EMPLOYER'S LIABILITY AND WORKMEN'S COMPENSATION.

Section 1. *This act shall apply only to workmen en-*

*gaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions or means of prosecution of such work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow-servants are great and difficult to avoid.* (a) The operation on steam or electric railroads of locomotives, engines, trains or cars, or the construction, alteration, maintenance or repair of steam railroad tracks or road beds over which such locomotives, engines, trains or cars are or are to be operated. (b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor. (c) The construction, operation, alteration or repair of wires or lines of wires, cables, switchboards or apparatus, charged with electric currents. (d) All work necessitating dangerous proximity to gun powder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry, or to any steam boiler owned or operated by the employer, provided the injury is occasioned by the explosion of any such boiler or explosive. (e) Work in or about any quarry, mine, or foundry. As to each of said employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

Section 2. If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, by failure of the employer to comply with any statute, or with any order made under authority of law, or by the negligence of the employer or any of his or its officers, agents or employees, or by reason of any defect or insufficiency due to his, its or their negligence in the condition of his

or its plant, ways, works, machinery, cars, engines, equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him, or, in case of his death, to his personal representatives for all damages now recoverable under the provisions of chapter 191 of the Public Statutes. The workman shall not be held to have *assumed the risk* of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the *negligence of the plaintiff contributed*. The damage provided for by this section shall be recovered in an action on the case for negligence.

Section 3. *The provisions of section 2 of this act shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this act as contained in the succeeding sections, and shall have satisfied the commissioner of labor of his financial ability to comply with its provisions, or shall have filed with the commissioner of labor a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this act. Such bond shall be enforced by the commissioner of labor for the benefit of all persons to whom such employer may become liable under this act in the same manner as probate bonds are enforced. The commissioner may, from time to time, order the filing of new bonds, when in his judgment such bonds are necessary; and after thirty days from the communication of such order to any employer, such employer shall be subject to the provisions of section 2 of this act until such order has been complied with. The employer may at any time revoke his acceptance of the provisions of the succeeding sections of this act by filing with the commissioner of labor a declaration to that effect, and by posting copies of such declaration in conspicuous places about the place where his workmen are employed. Any person aggrieved by any decision of the commissioner under this section may apply*

by petition to any justice of the superior court for a review of such decision and said justice on notice and hearing shall make such order affirming, reversing or modifying such decision as justice may require; and such order shall be final. Such employer shall be liable to all workmen engaged in any of the employments specified in section 1, for any injury arising out of and in the course of their employment, in the manner provided in the following sections of this act. *Provided*, that the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed, and, *provided*, that *the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the intoxication, violation of law, or serious wilful misconduct of the workman.* *Provided, further*, that the employer shall at the election of the workman, or his personal representative, be liable under the provisions of section 2 of this act for all injury caused in whole or in part by *wilful failure of the employer to comply with any statute, or with any order made under authority of law.*

Section 4. The right of action for damages caused by any such injury, at common law, or under any statute in force on January one, nineteen hundred and eleven, shall not be affected by this act, *but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this act, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury.* In case of such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this act against the employer therefor, he shall be barred from all benefit of this act in regard thereto.

Section 5. No proceedings for compensation under this act shall be maintained unless *notice of the accident* as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and during such disability, and unless *claim for compensation has been made within six months* from the occurrence of the accident, or in case of the death of the workman, or in the event of his physical or mental incapacity, within six months after such death or the removal of such physical or mental incapacity, or in the event that weekly payments have been made under this article, within six months after such payments have ceased, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy. Notice of the accident shall apprise the employer of the claim for compensation under this article, and shall state the name and address of the workman injured, and the date and place of the accident. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business.

Section 6. (1) *The amount of compensation* shall be, in case death results from injury: (a) If the workman leaves any widow, children, or parents, resident of this state, at the time of his death, then wholly dependent on his earnings, a sum to compensate them for loss, equal to one hundred and fifty times the average weekly earnings of such workman when at work on full time during the preceding year during which he shall have been in the employ of the same employer, or if he shall have been in the employment of the same employer for less than a year then one hundred and fifty times his average weekly earnings on full time for such less period, but in no event shall such sum exceed three thousand dollars. Any weekly payments made under this act shall be deducted from the sum so fixed. (b)

If such widow, children or parents at the time of his death are in part only dependent upon his earnings, such proportion of the benefits provided for those wholly dependent as the amount of the wage contributed by the decease to such partial dependents at the time of injury bore to the total wage of the deceased. (c) If he leaves no such dependents, the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars. Whatever sum may be determined to be payable under this act in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the persons to whom the expenses of medical attendance and burial are due.

(2) Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, not exceeding fifty per centum of his average weekly earning when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding one-half of the average weekly earnings on full time for such less period. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or is able to earn in

the same employment or otherwise after the accident, but shall amount to one-half of such difference. In no event shall any compensation paid under this act exceed the damage suffered, nor shall any weekly payment payable under this act in any event exceed ten dollars a week or extend over more than three hundred weeks from the date of the accident. Such payment shall continue for such period of three hundred weeks provided total or partial disability continue during such period. No such payment shall be due or payable for any time prior to the giving of the notice required by section five of this act.

Section 7. Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for *examination by a duly qualified medical practitioner* or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within two weeks after the injury, and thereafter at intervals not oftener than once a week. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

Section 8. *In case an injured workman shall be mentally incompetent* at the time when any right or privilege accrues to him under this act, the guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege, and no limitation of time in this act provided for shall run so long as said incompetent workman has no guardian.

Section 9. Any question as to compensation which may arise under this act shall be determined by agreement or by an action at equity as hereinafter provided. *In case the employer fail to make compensation as herein provided*, the injured workman, or his guardian, if such



be appointed, or his executor or administrator, may then bring an action to recover compensation under this act in any court having jurisdiction of an action for recovery of damages for negligence for the same injury between same parties. Such action shall be by *petition in equity*, which may be made returnable at the appropriate term of the superior court or may be filed in the office of the clerk of the superior court and presented in term time or vacation of any justice of said court, who on reasonable notice shall hear the parties and render judgment thereon. *The judgment* in such action if in favor of the plaintiff shall be for a lump sum equal to the amount of payments then due and prospectively due under this act. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the probate court in which such executor or administrator is appointed, in accordance with this act, on petition of any party interested, on such notice as such court may direct. Any employer who has declared his intention to act under the compensation features of this act shall also have the right to apply by similar proceedings to the superior court or to any justice thereof for a determination of the amount of the weekly payments to be paid the injured workman, or of a lump sum to be paid the injured workman in lieu of such weekly payments; and either such employer or workman may apply to said superior court or to any justice thereof in similar proceeding for the determination of any other question that may arise under the compensation feature of this act; and said court or justice, after reasonable notice and hearing, may make such order as to the matter in dispute and taxable costs as justice may require.

Section 10. Any person entitled to weekly payments under this act against any employer shall have the same *preferential claim* therefor against the assets of the employer as is allowed by law for a claim by such person



against such employer for unpaid wages of personal services. Weekly payments due under this act shall not be *assignable or subject to levy*, execution, attachment or satisfaction of debts. *Any right to receive compensation under this act shall be extinguished by the death of the person entitled thereto.*

Section 11. *No claim of any attorney-at-law for any contingent interest in any recovery under this act for services in securing such recovery or for disbursements shall be an enforceable lien on such recovery, unless the account of the same be approved in writing by a justice of the superior court, or, in case the same be tried in any court, by the justice presiding at such trial.*

Section 12. Every employer subject to the provisions of this act shall from time to time make to the commissioner of labor such returns as to its operation as said commissioner may require upon blanks to be furnished by said commissioner. Any employer failing to make such returns when required by said commissioner shall, until such returns are made, be subject to the provisions of section 2 of this act.

Section 13. This act shall take effect January first, nineteen hundred twelve. [Approved April 15, 1911.]

§ 874. New Jersey statute (Laws 1911, c. 95, p. 134).

An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employments, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder.

SECTION I. COMPENSATION BY ACTION AT LAW. (1)  
When personal injury is caused to an employee by accident arising out of and *in the course of his employment*, of which the actual or lawfully imputed *negligence of the employer is the natural and proximate cause*, he shall receive compensation therefor from his employer, providing the *employee was himself not wilfully negligent* at the time of receiving such injury, and the question of

whether the employee was wilfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

2. *The right to compensation as provided by Section I. of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow-employee; or that the injured employee assumed the risks inherent in or incidental to arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished.*

3. If an employer enters into a contract, written or verbal, with an *independent contractor* to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer under this act for injury caused to an employee of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one entrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under section one.

4. The provisions of paragraph one, two and three shall apply to any claim for the *death of an employee* arising under an act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default", approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto.

5. In all actions at law brought pursuant to Section I. of this act, the *burden of proof to establish wilful negligence* in the injured employee shall be upon the defendant.

6. No claim for legal services or disbursements pertaining to any demand made or suit brought under the provisions of this act shall be an enforceable lien against the amount paid as compensation, unless the same be approved in writing by the judge or justice presiding at the trial, or in case of settlement without trial, by the judge of the circuit court of the district in which such issue arose; provided, that if notice in writing be given the defendant of such claim for legal services or disbursements, the same shall be a lien against the amount paid as compensation, subject to determination of the amount and approval hereinbefore provided.

## SECTION II. ELECTIVE COMPENSATION.

7. *When employer and employee shall by agreement either express or implied, as hereinafter provided, accept the provisions of Section II. of this act, compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.*

8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Section II. of this act, and an acceptance of all the provisions of Section II. of this act, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer and those conducting his business during bankruptcy or insolvency.

9. *Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of Section II. of this act, and unless there be as a part of such contract an express statement in writing, prior to*

any accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II. of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of Section II. of this act and have agreed to be bound thereby. In the employment of minors, Section II. shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

10. The contract for the operation of the provisions of Section II. of this act may be terminated by either party upon sixty days' notice in writing prior to any accident.

11. *Following is the schedule of compensation:*

(a) For injury producing temporary disability, fifty per centum of the wages received at the time of injury subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; provided, that if at the time of injury the employee receives wages of less than five dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(b) For disability total in character and permanent in quality, fifty per centum of the wages received at the time of the injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; provided, that if at the time of injury the employee receives wages of less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(c) For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit: For the loss of a thumb, fifty per centum of daily wages during sixty weeks. For the loss of a first finger, commonly called index finger, fifty per

centum of daily wages during thirty-five weeks. For the loss of a second finger, fifty per centum of daily wages during thirty weeks. For the loss of a third finger, fifty per centum of daily wages during twenty weeks. For the loss of a fourth finger, commonly called little finger, fifty per centum of daily wages during fifteen weeks. The loss of the first phalange of the thumb, or of any finger shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified. The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand. For the loss of a great toe, fifty per centum of daily wages during thirty weeks. For the loss of one of the toes other than the great toe, fifty per centum of daily wages during ten weeks. For the loss of a first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire toe. For the loss of a hand, fifty per centum of daily wages during one hundred and fifty weeks. For the loss of an arm, fifty per centum of daily wages during two hundred weeks. For the loss of a foot, fifty per centum of daily wages during one hundred and twenty-five weeks. For the loss of a leg, fifty per centum of daily wages during one hundred and seventy-five weeks. For the loss of an eye, fifty per centum of daily wages during one hundred weeks. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).

In all other cases in this class the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. Should the em-

ployer and employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of paragraph twenty hereof. The amounts specified in the clause are all subject to the same limitations as to maximum and minimum as are stated in clause (a).

12. *In case of death* compensation shall be computed but not distributed on the following basis: (1) Actual dependents. If orphan or orphans, a minimum of twenty-five per centum of wages of deceased, with ten per centum additional for each orphan in excess of two, with a maximum of sixty per centum. If widow alone, twenty-five per centum of wages. If widow and one child, forty per centum of wages. If widow and two children, forty-five per centum of wages. If widow and three children, fifty per centum of wages. If widow and four children, fifty-five per centum of wages. If widow and five children or more, sixty per centum of wages. If widow and father or mother, fifty per centum of wages. If grandparents, grandchildren, or minor, or incapacitated brothers or sisters, twenty-five per centum of wages. Compensation in case of death shall be computed on the basis of the foregoing schedule, but *shall be distributed according to the laws of this State providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will.*

(2) No dependents. Expenses of last sickness and burial not exceeding two hundred dollars. In computing compensation to orphans or other children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease. The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; provided, that if at the time of injury the employee receives wages of less than five dollars per week, then the compensation shall be the full amount of such wages per week. This

compensation shall be paid during three hundred weeks. Compensation under this schedule shall not apply to alien dependents not residents of the United States.

13. No compensation shall be allowed for the first two weeks after injury received, except as provided by paragraph fourteen, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in paragraph fifteen.

14. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, as and when needed, not to exceed one hundred dollars in value, unless the employee refuses to allow them to be furnished by the employer.

15. Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee, or some one on his behalf or some of the dependents, or some one on their behalf, shall give *notice thereof to the employer within fourteen days of the occurrence of the injury*, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employee, or other beneficiary shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained or notice given, within ninety days after the occurrence of the injury no compensation shall be allowed.



16. *The notice referred to* may be served personally upon the employer, or upon any agent of the employer upon whom a summons may be served in a civil action or by sending it through the mail to the employer at the last known residence or business place thereof within the State, and shall be substantially in the following form:

To (name of employer):

You are hereby notified that a personal injury was received by (name of employee injured), who was in your employ at (place) while engaged as (nature of employment, on or about the (.....) day of (.....), nineteen hundred and (.....), and that compensation will be claimed therefor.

(Signed), (.....).

but no variation from this form shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. Notice served at the office of, or on the person who was the employee's immediate superior, shall be a compliance with this act.

17. After an injury, the employee, if so requested by his employer, must *submit himself for examination* at some reasonable time and place within the State, and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this State. If the employee requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employee to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension.

18. *In case of a dispute over, or failure to agree upon, a claim for compensation* between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and



effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, *and his decision as to all questions of fact shall be conclusive and binding.*

19. *In case of death*, where no executor or administrator is qualified, the said judge shall, by order, direct payment to be made to such persons as would be appointed administrator of the estate of such decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

20. Procedure in case of dispute shall be as follows: Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner.

Upon the presentation of such petition the same shall be filed with the clerk of the Court of Common Pleas, and the judge shall fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition shall be served as summons in a civil action, and may be served within four days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an *answer to said petition*, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant

with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition.

*At the time fixed for hearing* or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the Common Pleas Court, and *judgment shall be entered* thereon in the same manner as in causes tried in the Court of Common Pleas, and shall contain a statement of facts as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by *certiorari*. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for the like services in the Common Pleas Court.

21. The amounts payable periodically as compensation may be commuted to one or more lump sum payments by the judge of the Court of Common Pleas having jurisdiction as set forth in the preceding paragraph, upon the application of either party, in his discretion, provided the same be in the interest of justice. Unless so approved, no compensation payments shall be commuted.

*An agreement or award of compensation may be modified* at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished. In such case the provisions of paragraph seventeen with reference to medical examination shall apply.

22. The right of compensation granted by this act shall have the same *preference* against the assets of the employer as is now or may be hereafter allowed by law

for a claim for unpaid wages for labor. Claims or payments due under this act shall not be *assignable*, and shall be *exempt* from all claims of creditors and from levy, execution or attachment.

### SECTION III. GENERAL PROVISIONS.

23. For the purposes of this act, *wilful negligence* shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury.

Wherever in this act the singular is used the plural shall be included; where the masculine gender is used, the feminine and neuter shall be included.

*Employer* is declared to be synonymous with master and includes natural persons, partnerships and corporations; *employee* is synonymous with servant and includes all natural persons who perform service for another for financial considerations, exclusive of casual employments.

Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot.

24. *In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, except that Sections I. and II. are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I. of this act shall not apply in cases where Section II. becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law.*

25. Every right of action for negligence, or to recover damages for injuries resulting in death, existing before this act shall take effect, is continued, and nothing in

this act contained shall be construed as affecting any such right of action, nor shall the failure to give the notice provided for in Section II., paragraph fifteen of this act, be a bar to the maintenance of a suit upon any right of action existing before this act shall take effect.

26. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

27. This act shall take effect on the fourth day of July next succeeding its passage and approval. [Approved April 4, 1911.]

CHAPTER 368, P. 763, LAWS N. J., 1911.

*A supplement to an act* entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder", approved April 4, one thousand nine hundred and eleven. Be it enacted by the Senate and General Assembly of the State of New Jersey: 1. Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

2. This act shall take effect on the fourth day of July next succeeding its passage and approval. [Approved May 2, 1911.]

CHAPTER 241, P. 520, LAWS N. J., 1911.

An Act creating the employers' liability commission and prescribing its powers and duties and requiring reports to be made by the employers of labor upon the operation of the employers' liability law for the information of said commission. Be it enacted by the Senate

and General Assembly of the State of New Jersey: 1. The Governor is hereby authorized to appoint six citizens of this State as an employers' liability commission, who shall hold their offices for the term of two years and until their successors are appointed and qualified. They shall receive no compensation for their services, but their actual traveling expenses incurred upon the business of the commission shall be paid by the State Treasurer, upon warrants approved by the president of the said commission. The commission shall have power to choose one of their number as president and one of their number as secretary, and shall have power to appoint a clerk. The expenses of the commission, the salary of the secretary and of the clerk shall be paid from appropriations made for that purpose in any annual or supplemental appropriation bill. It shall be the duty of the commission to observe in detail, so far as possible, the operations throughout the State of the recent act of the Legislature commonly known as "The Employers' Liability Act", entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven.

2. From and after the fourth day of July next, when the said law becomes operative, *every employer* of labor within the State of New Jersey, *shall report to said commission*, upon the occurrence of any injury to any of his employees, the name and nationality of the employee so injured, the nature and extent of such injury, whether said injured employee and the employer at the time of said injury were subject to the provisions of section one or section two of said act, and the amount of compensation when determined, together with such other facts relating to such injury as the commission may request. The information thus received shall be tabulated, from time to time, and the records thereof shall be the pri-

vate records of the commission; they shall not be made public or open to inspection unless in the opinion of the commission the public interests shall require it, and they shall not be used as evidence against any employer in any suit or action at law brought by any employee for the recovery of damages. The commission shall hold meetings, from time to time, as they may deem necessary, and shall present to each session of the Legislature a report showing the operations under the said act during the preceding year, together with any suggestions or recommendations which they may deem necessary or proper for the improvement of the said act, in order to accomplish with the greatest efficiency the purposes of the said act.

3. This act shall take effect immediately. [Approved April 27, 1911.]

**§ 875. Ohio statute (Laws 1911, c. 127.)**

An Act to create a state insurance fund for the benefit of injured, and the dependents of killed employees, and to provide for the administration of such fund by a state liability board of awards.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. There is hereby created a state liability board of awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, and one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term.

Section 2. Each member of the board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with

his duty as such member, or serve on or under any committee of any political party.

Section 3. Each member of the board shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of state officers are paid.

Section 4. The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open to the public, and shall stand and be adjourned without further notice thereof on its records. All proceedings of the board shall be shown on its records of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast.

Section 5. A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining members to exercise all the powers of the full board so long as a majority remains. Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the board. All investigations, inquiries, hearings, and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the board.

Section 6. The board shall keep and maintain its office in the City of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expenses shall be audited and paid out of the state treasury. The board may hold sessions at any place within the state.

Section 7. The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compen-



sation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board.

Section 8. The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof in cases of accident and injury to employees, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

Section 9. Every employer shall furnish the board, upon request, all information required by it to carry out the purposes of this act. The board or any member thereof, or any person employed by the board for that purpose, shall have the right to examine under oath any employer or officer, agent or employee thereof.

Section 10. Every employer receiving from the board any blank with directions to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the board within the period fixed by the board for such return.

Section 11. Each member of the board, the secretary and every inspector or examiner appointed by the



board shall, for the purposes contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

Section 12. In case of disobedience of any person to comply with the order of the board, or subpoena issued by it as one of its inspectors, or examiners, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoena issued from such court on a refusal to testify therein.

Section 13. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears in obedience to a subpoena, before the board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the board. No witness subpoenaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated.

Section 14. In an investigation, the board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas.

Section 15. A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the board, be-

ing certified by such stenographer to be a true and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and subscribed, may be received in evidence by the board with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in courts of common pleas.

Section 16. The board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable, and it shall be the duty of insured employers to constantly keep on hand sufficient supply of such blanks.

Section 17. The state liability board of awards *shall classify employments with respect to their degree of hazard, and determine the risks of the different classes, and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employees in each of said classes of employment*, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.

Section 18. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employees as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employees of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employees, and shall adopt

rules and regulations with respect to the collection, maintenance and disbursement of said fund.

Section 19. The treasurer of state shall be the custodian of the state insurance fund, and all disbursement therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards.

Section 20. The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for.

Section 20-1. Any employer who employs *five or more workmen* or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, *shall not be liable to respond in damages at common law or by statute, save as hereinafter provided*, for injuries or death of any such employee, wherever occurring, during the period covered by such premiums, *provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employee of his right of action as aforesaid.*

Each employer paying the premiums provided by this act into the state insurance fund shall *post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employees of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.*

Section 20-2. For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employees in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912,

and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employees shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employees in the following proportions, to wit: *Ninety per cent of the premium shall be paid by the employer and ten per cent by the employees. Each employer is authorized to deduct from the pay roll of his employees ten per cent of the said premium for any premium period in proportion to the pay roll of such employees; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employee showing the amount which has been deducted and paid into the state insurance fund.*

Section 21. The state liability board of awards shall disburse the state insurance fund to such employees of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, where-soever such injury has occurred, *and which have not been purposely self inflicted*, or to their dependents in case death has ensued.

Section 21-1. *All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employees, and also to the personal representatives of such employees where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:*

*The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.*

Section 21-2. But where a personal injury is suffered by an employee, or when death results to an employee from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the wilful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employee, or to his legal representative in case death results, except as provided in this act.

Every employee, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises his option to institute proceedings in court as provided in section 21-2, waives his right to any award; except as provided in section 36 of this act.

Section 23. The board shall disburse and pay from the fund, for such injury, to such employees, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however, in any case, to exceed the sum of two hundred dollars, in addition to such award to such employee.

Section 24. In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred

and fifty dollars, shall be paid from the fund, in addition to such award to such employee.

Section 25. No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections.

Section 26. *In case of temporary or partial disability, the employee shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employee's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed three thousand four hundred dollars in amount from that injury.*

Section 27. *In case of permanent total disability the award shall be sixty-six and two-thirds per cent of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employee's wages were less than five dollars per week, then he shall receive his full wages.*

Section 28. *In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:*

1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in sections 23 and 24.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wage and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-

thirds per cent of the average weekly wage and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.

Section 29. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor.

Section 30. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board.

Section 31. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

Section 32. If it is established that the injured employee was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

Section 33. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified.

Section 34. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

Section 35. *Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents.*



Section 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, *and its decision thereon shall be final.*

*Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.*

Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board.

The costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. *Either party shall have the right to prosecute error as in the ordinary civil cases.*

Section 36-1. *Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner*



as in their judgment, is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.

Section 37. The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks and other assistants, and all other expenses of the board herein authorized, including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of state, who shall issue his warrant therefor as in other cases.

Section 38. No provision of this act relating to the amount of compensation shall be considered by, or called to the attention of the jury on the trial of any action to recover damages as herein provided.

Section 39. Annually on or before the 15th day of November, such board, under the oath of at least two of its members, shall make a report to the governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such board deems it proper to call to the attention of the governor, including any recommendations it may have to make.

Section 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board.

Section 41. The expenses of such board in carrying out the provisions of this act shall be paid from January 1, 1912, to January 1, 1913, out of the general revenue

fund of the state not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members.

[Passed May 31, 1911. Approved June 15, 1911.]

**§ 876. Washington statute. (Laws 1911, c. 74, p. 345.)**

**RELATING TO COMPENSATION OF INJURED WORKMEN.**

An act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the nonobservance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595, and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employees in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof.

**Section 1. DECLARATION OF POLICE POWER.**

The common law system governing the remedy of workmen against employers for injuries recieved in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional have become frequent and inevitable. The welfare of the state depends upon its industries, and even more

upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of question of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; *and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as, in this act provided.*

**Section 2. ENUMERATION OF EXTRA HAZARDOUS WORKS.**

There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extra hazardous" wherever used in this act, to wit:

Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast, furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelter, powder works, laundries operated by power, quarries, engineering works, logging, lumbering and shipbuilding operations, logging, street and interurban railways, buildings being constructed, repaired, moved or demolished, telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steam boats, tugs, ferries and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund here-

inafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4.

### Section 3. DEFINITIONS.

In the sense of this act words employed mean as here stated, to wit:

*Factories* mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

*Workshop* means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, furnishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

*Mill* means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers.

*Mine* means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

*Quarry* means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

*Engineering work* means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals, electric, steam or water power plants, telegraph or telephone plants and lines, electric light or power lines,

and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used.

Except when otherwise expressly stated, *employer* means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extra hazardous work.

*Workman* means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death results from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.*

*Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured, shall be*

entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

*Dependent* means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz: invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, *aliens*, other than father or mother, not residing within the United States at the time of the accident, are not included.

*Beneficiary* means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

*Invalid* means one who is physically or mentally incapacitated from earning.

The word "*child*" as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

*The words injury or injured*, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease.

#### Section 4. SCHEDULE OF CONTRIBUTION.

Insomuch as industry should bear the greater portion of the burden of the cost of its accidents, *each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay roll for that year, to-wit: (the same being deemed the most accurate method of equitable distribution or in proportion to relative hazard):*

*Construction Work.*

Tunnels; bridges; trestles; sub-aqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire escapes; sewers; house moving; house wrecking.....	065
Iron, or steel frame structures or parts of structures..	080
Electric light or power plants or systems; telegraph or telephone systems; pile driving; steam railroads.....	050
Steeple, towers or grain elevators, not metal framed; dry-docks without excavation; jetties; breakwaters; chimneys; marine railways; waterworks or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters.....	050
Steam heating plants; tanks, water towers or windmills, not metal frames.....	040
Shaft sinking.....	060
Concrete buildings; freight or passenger elevators; fire-proofing of buildings; galvanized iron or tin works; gas works, or systems; marble, stone or brick work; road making with blasting; roofwork; safe moving; slate work; outside plumbing work; metal smokestacks or chimneys.....	050
Excavations not otherwise specified; blast furnaces..	040
Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings.....	035
Ship or boat building or wrecking with scaffolds floating docks.....	045
Carpenter work not otherwise specified.....	035
Installation of steam boilers or engines; placing wire in conduits; installing dynamos; putting up belts for machinery; marble, stone or tile settings, inside work; mantel setting; metal ceiling work; mill or ship wrighting; painting of buildings or structures; installation of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering	



steam pipes or boilers; installation of machinery not otherwise specified.....	030
Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass settings; building hot houses; lathing; paper hangings; blastings; inside plumbing; wooden stair building; road making.....	020

*Operation (Including Repair Work) Of.*

(All combinations of material take the higher rate when not otherwise provided.)

Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks.....	050
Electric light or power plants; interurban electric railroads not using the third rail system; quarries	040
Street railways, all employees; telegraph or telephone systems; stone crushing; blasting furnaces; smelters; coal mines; gas works; steamboats; tugs; ferries.....	030
Mines, other than coal; steam heating or power plants.....	025
Grain elevators; laundries; waterworks; paper or pulp mills; garbage works.....	020

*Factories Using Power-Driven Machinery.*

Stamping tin or metal.....	045
Bridge work; railroad car or locomotive making or repairing; cooperage; logging with or without machinery; saw mills; shingle mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fibre ware; rolling mills; making steam shovels or dredges; tanks; water towers; asphalt; building material not otherwise specified; fertilizer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries; metal stamping extra; creosoting works; pile treating works....	025



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Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware; tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware; peat fuel; brickettes.....	020
Breweries; bottling works; boiler works; foundries; machine shops not otherwise specified.....	020
Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or textiles not otherwise specified.....	015
Making jewelry, soap, tallow, lard, grease, condensed milk.....	015
Creameries; printing; electrotyping; photo-engraving; engraving; lithographing.....	015

*Miscellaneous Work.*

Stevedoring; longshoring.....	030
Operating stock yards, with or without railroad entry; packing houses.....	025
Wharf operation; artificial ice; refrigerating or cold storage plants; tanneries; electric systems not otherwise specified.....	020
Theater stage employees.....	015
Fire works manufacturing.....	050
Powder works.....	100

The application of this act as between employers and workmen shall date from and including the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminary collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, an adjustment

shall be made on or before February 1st of the following year in the manner above provided.

For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. *Each class shall meet and be liable for the accidents occurring in such class.* There shall be collected from each class as an initial payment into the accident fund as above specified on or before the first day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: *Provided*, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

*The fund thereby created shall be termed the "accident fund" which shall be devoted exclusively to the purpose specified for it in this act.*

*In that the intent is that the fund created under this section shall ultimately become neither more or less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to re-arrangement following any relative increase or decrease of hazard shown by experience.*

*It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless manage-*

ment, *any establishment or work is unduly dangerous in comparison with other like establishment or works, the department may advance its classifications of risks and premium rates in proportion to the undue hazard.* In accordance with the same principle, any such increase in classification, or premium rate, shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the first day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

For the purposes of such payment and making good of deficit the particular class of industry shall be as follows:

*Construction Work.*

Class 1. Tunnels; sewer; shafting; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples; towers or grain elevators not metal framed; tanks, water towers, wind-mills not metal framed.

Class 3. Sub-aqueous works; canal other than irrigation or docks with or without blasting; pile driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structure or parts of structures; fire escapes; erecting fire-proof doors or shutters; blast furnaces; concrete chimneys; freight or passenger elevators; fire proofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smoke stack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling

work; painting of buildings or structures; concrete laying in floors or foundations; glass setting; building hot houses; lathing; paper hanging; plastering; wooden stair building.

Class 6. Electric light and power plants or system; telegraph or telephone systems; cable or electric railways with or without rock work or blasting; waterworks or systems; steam heating plants; gas works or systems; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installation of automatic sprinklers; covering steam pipes or boilers; installation of machinery not otherwise specified; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems.

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

*Operation (Including Repair Work) Of.*

Class 10. Logging; saw mills; shingle mills; lath mills; masts and spars with or without machinery.

Class 12. Dredges; dry or floating docks.

Class 13. Electric light or power plants or systems; steam heating or power plants or systems; electric systems not otherwise specified.

Class 14. Street railways.

Class 15. Telegraph systems; telephone systems.

Class 16. Coal mines.

Class 17. Quarries; stone crushing; mines other than coal.

Class 18. Blast furnaces; smelters; rolling mills.

Class 19. Gas works.

Class 20. Steamboats; tugs; ferries.

Class 21. Grain elevators.

Class 22. Laundries.

Class 23. Water works.

Class 24. Paper or pulp mills.

Class 25. Garbage works; fertilizer.

*Factories (Using Power-Driven Machinery.)*

Class 26. Stamping tin or metal.

Class 27. Bridge work; making steam shovels or dredges; tanks; water towers.

Class 28. Railroad car or locomotive making or repairing.

Class 29. Cooperage; staves; veneer; box; packing cases; sash, door or blinds; barrel; keg; pail; baskets; tub; wood ware or wood fibre ware; kindling wood; excelsior; working in wood not otherwise specified.

Class 30. Asphalt.

Class 31. Cement; stone with or without machinery; building material not otherwise specified.

Class 32. Canneries of fruits or vegetables.

Class 33. Canneries of fish or meat products.

Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; foundries; machine shops not otherwise specified.

Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware.

Class 36. Peat fuel; brickettes.

Class 37. Breweries; bottling works.

Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.

Class 39. Working in food stuffs, including oils, fruits, vegetables.

Class 40. Condensed milk; creameries.

Class 41. Printing; electrotyping; photo-engraving; engraving; lithographing; making jewelry.

Class 42. Stevedoring; longshoring; wharf operation.

Class 43. Stock yards; packing houses; making soap, tallow, lard, grease; tanneries.

Class 44. Artificial ice, refrigerating or cold storage plants.

Class 45. Theater stage employees.

Class 46. Fire works manufacturing; powder works.

Class 47. Creosoting works; pile treating works.

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards. *If an employer besides employing workmen in extra hazardous employment shall also employ workmen in employments not extra hazardous the provisions of this act shall apply only to the extra hazardous department and employments and the workmen employed therein.* In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise.

#### Section 5. SCHEDULE OF AWARDS.

Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents, in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

##### *Compensation Schedule.*

(a) Where death results from the injury the expenses of burial shall be paid in all cases, not to exceed \$75.00 in any case, and

(1) If the workman leaves a widow or invalid widower, a monthly payment of \$20.00 shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall receive \$5.00 per month for each child of the deceased under the age of sixteen years at

time of the occurrence of the injury until minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed \$35.00. Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, viz: the sum of \$240.00, but the monthly payment for the child or children shall continue as before.

(2) *If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of \$10.00 shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed \$35.00, and any deficit shall be deducted proportionately among the beneficiaries.*

(3) *If the workman leaves no widow, widower, or child under the age of sixteen, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20.00 per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstance, the necessity creating the dependency would have ceased if the injury had not happened.*

If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20.00 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

(4) In the event a surviving spouse receiving monthly payments shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter,



until such child shall arrive at the age of sixteen years, paid to the child increased one hundred per cent, but the total to all children shall not exceed the sum of thirty-five dollars per month.

(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

(1) If unmarried at the time of the injury, the sum of twenty dollars.

(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of \$25.00. If the husband is not an invalid, the monthly payment of \$25.00 shall be reduced to \$15.00.

(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or a widower, have any such child or children, the monthly payment provided in the preceding paragraph shall be increased by five dollars for each such child until such shall arrive at the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars.

(c) If the injured workman die during the period of total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars per month until death or remarriage, to be increased five dollars per month for each child under the age of sixteen years until such child shall arrive at the age of sixteen years; but if such child is or shall be without father or mother, such child shall receive ten dollars per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed thirty-five dollars.



Upon remarriage the payments of account of a child or children shall continue as before to the child or children.

(d) When the total disability is only temporary the schedule of payment contained in paragraphs (1), (2) and (3) of the foregoing subdivision (d) shall apply so long as the total disability shall continue, increased 50 per cent for the first six months of such continuance but in no case shall the increase operate to make the monthly payment exceed sixty per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent.

(e) *For every case of injury resulting in death or permanent total disability* it shall be the duty of the department to forthwith notify the state treasurer, and he shall set apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of twenty dollars, to a person thirty years of age, is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of four thousand dollars, but the total in no case to exceed the sum of four thousand dollars. The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly installments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such segregations of the accident fund, and

may borrow from the main fund to meet monthly payments pending conversion into cash of any security, and in such case shall repay such temporary loan out of the cash realized from the security.

(f) *Permanent partial disability means* the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability, compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents or parent shall also receive a lump sum payment equal to ten per cent of the amount awarded the minor workman.

(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

(h) *If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment.*

(i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.

(j) If a beneficiary shall reside or remove out of the state the department may, in its discretion, convert any monthly payments provided for such case into a lump sum payment (not in any case to exceed \$4,000.00) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth \$4,000.00, or, with the consent of the beneficiary, for a smaller sum.

(k) *Any court review* under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred

#### Section 6. INTENTIONAL INJURIES; STATUS OF MINORS.

*If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death*, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. *If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death*, the workman, the widow, widower, child or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted, for any excess of damage over the amount received or receivable under this act.

A minor working at the age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor workman except as expressly provided in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as the other property of minors.

**Section 7. CONVERSION INTO LUMP SUM PAYMENTS.**

In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed \$4,000.00), on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person of thirty years of age is worth the sum of \$4,000.00, in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary.

**Section 8. DEFAULTING EMPLOYERS.**

If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. *The person so entitled under*

*the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow-servant and assumption of risk shall be inadmissible, and the doctrine of comparative neglect shall obtain. Any such case of action assigned to the state may be prosecuted or compromised by the department in its discretion. Any compromise by the workmen of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.*

**Section 9. EMPLOYER'S RESPONSIBILITY FOR SAFEGUARD.**

*If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statute or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same required by section 4 to be paid:*

(a) *In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to fifty per cent of that amount.*

(b) *In case the consequent payment to the workman be payable in monthly payments, a sum equal to fifty per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in section 7.*

*The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow-workmen, unless such removal be by order or direction of the*

employer or superintendent or foreman of the employer, or any one placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow-workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or any one placed by the employer in control, or direction of such workman, the schedule of compensation provided in section 5 shall be reduced 10 per cent. and for the individual case of the workman.

Section 10. EXEMPTION OF AWARDS.

No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being *assigned*, charged, nor even to be taken in *execution or attached or garnished*, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void.

Section 11. NON-WAIVER OF ACT BY CONTRACT.

No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void.

Section 12. FILING CLAIM FOR COMPENSATION.

(a) Where a workman is entitled to compensation under this act, he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

(b) *Where death results from injury* the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the de-

partment, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such proof as required by the rules of the department.

(c) If change of circumstance warrant an increase or rearrangement of compensation, like application shall be made thereof. No increase or rearrangement shall be operative for any period prior to application therefor.

(d) *No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred, or the right thereto accrued.*

### Section 13. MEDICAL EXAMINATION.

Any workman entitled to receive compensation under this act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination, or obstructs the same, his right to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

### Section 14. NOTICE OF ACCIDENT.

Whenever any accident occurs to any workman *it shall be the duty of the employer to at once report such accident* and the injury resulting therefrom to the department, and also to any local representative of the department. Such report shall state:

1. The time, cause and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.

2. Whether the accident arising out of or in the course of the injured person's employment.

3. Any other matters the rules and regulations of the department may prescribe.



**Section 15. INSPECTION OF EMPLOYER'S BOOKS.**

The books, records and pay rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the pay roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records and pay rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor.

**Section 16. PENALTY FOR MISREPRESENTATION AS TO PAY ROLL.**

Any employer who shall misrepresent to the department the amount of pay roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state. All sums collected under this section shall be paid into the accident fund.

**Section 17. PUBLIC AND CONTRACT WORK.**

Whenever the state, county or any municipal corporation shall engage in any extra hazardous work in which workmen are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the state, county or municipality. If said work is being done by contract, the pay roll of the contractor and the subcontractor shall be the basis of computation, and in the case of contract work consuming less than one year in



performance the required payment into the accident fund shall be based upon the total pay roll. The contractor and any sub-contractor shall be subject to the provisions of the act, and the state for its general fund, the county or municipal corporation shall be entitled to collect from the contractor the full amount payable to the accident fund, and the contractor in turn shall be entitled to collect from the sub-contractor his proportionate amount of the payment. The provisions of this section shall apply to all extra hazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter or municipal ordinance, provision is made for municipal employees injured in the course of employment, such employees shall not be entitled to the benefits of this act and shall not be included in the pay roll of the municipality under this act.

#### Section 18. INTERSTATE COMMERCE.

The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium

shall be on the basis of the pay roll of the workmen who accept as aforesaid.

Section 19. ELECTIVE ADOPTION OF ACT.

*Any employer and his employees engaged in works not extra hazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent. of the minimum rate specified in section 4, shall be applicable to such case until otherwise provided by law.*

Section 20. COURT REVIEW.

Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interest under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision (1) of section numbered 5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that *matters resting in the discretion of the department shall not be subject to review.* The proceedings in every appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless *notice of appeal* shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. No *bond* shall be required, except that no appeal by the employer from a decision of the department under section 9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a *stay*.

The calling of a *jury* shall rest in the discretion of the court except that in cases arising under sections 9, 15 and 16 either party shall be entitled to a jury trial upon demand. *It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee*, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is effected by the litigation. *In other respects the practice in civil cases shall apply.* Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal adviser of the department and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

Section 21. CREATION OF DEPARTMENT.

The administration of this act is imposed upon a department, to be known as the *Industrial Insurance Department*, to consist of three commissioners to be appointed by the governor. One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commissioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of state a statement of his reasons thereof. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol,

but branch offices may be established at other places in the state. Each member of the commission shall have power to issue subpoenas requiring attendance of witnesses and the production of books and documents.

**Section 22. SALARY OF COMMISSIONERS.**

The salary of each of the commissioners shall be thirty-six hundred dollars per annum, and he shall be allowed his actual and necessary traveling and incidental expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses, and such compensation as the commission may deem proper, not to exceed six dollars per day to an auditor, or five dollars per day to any other assistant.

**Section 23. DEPUTIES AND ASSISTANTS.**

The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed five thousand dollars per month. They may employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to five dollars for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms and blanks. They may establish and require all employers to install and maintain an uniform form of pay roll.

**Section 24. CONDUCT, MANAGEMENT AND SUPERVISION OF DEPARTMENT.**

The commission shall, in accordance with the provisions of this act:

1. Establish and promulgate rules governing the administration of this act.
2. Ascertain and establish the amounts to be paid into and out of the accident fund.

3. Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

4. Supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome.

5. Issue proper receipts for moneys received, and certificates for benefits accrued and accruing.

6. Investigate the causes of all serious injuries and report to the governor from time to time any violation or laxity in performance of protective statutes or regulations coming under the observation of the department.

7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses.

8. Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid.

#### Section 25. MEDICAL WITNESSES.

Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed ten dollars per day each.

#### Section 26. DISBURSEMENT OF FUNDS.

Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every

warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An act to provide for state depositories and to regulate deposits of state moneys therein", shall be applied to said moneys and the handling thereof by the state treasurer.

**Section 27. TEST OF INVALIDITY OF ACT.**

If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workmen, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 4 of this act for the creation of the accident fund, or the provisions of this act making compensation to the workman provided in it exclusive of

any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidated except the provisions of section 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof.

**Section 28. STATUTE OF LIMITATIONS SAVED.**

If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of invalidity, shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: *Provided*, That such action be commenced within one year after such repeal or adjudication; but in any such action any sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by section 4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed.

**Section 29. APPROPRIATIONS.**

There is hereby appropriated out of the state treasury the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident fund; and there is hereby appropriated out of



the accident fund for the purpose to which said fund is applicable the sum of \$1,500,000.00, or so much thereof as shall be necessary for the purposes of this act.

**Section 30. SAFEGUARD REGULATIONS PRESERVED.**

Nothing in this act contained shall repeal any existing law providing for the installation or maintenance of any device, means or method for the prevention of accidents in extra hazardous work or for a penalty or punishment for failure to install or maintain any such protective device, means or method but sections 8, 9 and 10 of the act approved March 6, 1905, entitled: "An act providing for the protection and health of employees in factories, mills or workshops, where machinery is used, and providing for suits to recover damages sustained by the violation thereof, and prescribing a punishment for the violation thereof and repealing an act entitled, 'An act providing for protection of employees in factories, mills, or workshops where machinery is used, and providing for the punishment of the violation thereof, approved March 6, 1903', and repealing all other acts or parts of acts in conflict herewith," are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

**Section 31. DISTRIBUTIONS OF FUNDS IN CASE OF REPEAL.**

If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

**Section 32. SAVING CLAUSE.**

This act shall not affect any action pending or cause of action existing on the 30th day of September, 1911.



§ 877. Wisconsin statute. Laws 1911, c. 50, as amended by Laws 1911, c. 644, the amendments being enclosed in brackets.

AN ACT to create sections 2394-1 to 2394-32 of the statutes (to be included in a new chapter of the statutes to be numbered chapter 110a), relating to the liability of employers for injuries or death sustained by their employees, providing for compensation for the accidental injury or death of employees, establishing an industrial accident board, defining its powers, providing for a review of its awards, and making an appropriation to carry out the provisions of this act.

*The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:*

Section 1. There are added to the statutes thirty-two new sections to read: Section 2394-1. *In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or any officer, agent, or servant of the employer, it shall not be a defense:*

1. *That the employee either expressly or impliedly assumed the risk of the hazard complained of.*

2. *When such employer has at the time of the accident in a common employment four or more employees, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow-servant.*

*Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this section 2394-1.*

Section 2394-2. *No contract, rule, or regulation, shall exempt the employer from any of the provisions of [section 2394-1].*

Section 2394-3. *Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsection 9 of section 1816 of the statutes, the term "employer" as used in [sections 2394-1 and 2394-2] shall not include any railroad company as*

defined in subsection 7 of said section 1816, said section 1816 being continued in force unaffected, except as aforesaid, by [sections 2394-1 and 2394-2.]

Section 2394-4. *Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:*

1. *Where, at the time of the accident, both the employer and employee are subject to the provisions of [sections 2394-1 to 2394-31 inclusive] according to the succeeding sections hereof.*

2. *Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment.*

3. *Where the injury is proximately caused by accident, and is not so caused by wilful misconduct.*

And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of [sections 2394-1 to 2394-31 inclusive], shall be the *exclusive remedy* against the employer for such injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of [sections 2394-1 to 2394-31 inclusive] had not been passed, but shall be subject to the provisions of [sections 2394-1 to 2394-3 inclusive] of this act.

Section 2394-5. *The following shall constitute employers subject to the provisions of [sections 2394-1 to 2394-31 inclusive] within the meaning of the preceding section:*

1. *The state, and each county, city, town, village, and school district therein.*

2. *Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation*

under [sections 2394-1 to 2394-31 inclusive] may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of [sections 2394-1 to 2394-31 inclusive], and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

Section 2394-6. *Such election* on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of [sections 2394-1 to 2394-31 inclusive], the filing of which statement shall operate, within the meaning of section 2394-5, to subject such employer to the provisions of [sections 2394-1 to 2394-31 inclusive] for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of [sections 2394-1 to 2394-31 inclusive].

Section 2394-7. *The term "employee"* as used in section 2394-4 shall be construed to mean:

1. Every person in the service of the state, or of any county, city, town, village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein, provided that one, employed by a contractor, who has contracted with a county, city, town, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, town, village, or school district which made the contract.

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally

permitted to work under the laws of the state (who, for the purposes of [section 2394-8], shall be considered the same and shall have the same power of contracting as adult employees), but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

Section 2394-8. *Any employee as defined in subsection 1 of the preceding section shall be subject to the provisions of [sections 2394-1 to 2394-31 inclusive]. Any employee as defined in subsection 2 of the preceding section shall be deemed to have accepted and shall, within the meaning of section 2394-4, be subject to the provisions of [sections 2394-1 to 2394-31 inclusive], if, at the time of the accident upon which liability is claimed:*

1. *The employer charged with such liability is subject to the provisions of [sections 2394-1 to 2394-31 inclusive], whether the employee has actual notice thereof or not; and*

2. *Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of [sections 2394-1 to 2394-31 inclusive]; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of [sections 2394-1 to 2394-31 inclusive], such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of [sections 2394-1 to 2394-31 inclusive].*

Section 2394-9. *Where liability for compensation under [sections 2394 to 2394-31 inclusive] exists, the same shall be as provided in the following schedule:*

1. *Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury*

and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer; and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same.

2. *If the accident causes disability*, an indemnity which shall be payable as wages on the eighth day after the injured employee leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

(a) If the accident causes total disability, sixty-five per cent. of the average weekly earnings during the period of such total disability; provided that, if the disability is such as not only to render the injured employee entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to one hundred per cent of the average weekly earnings.

(b) If the accident causes partial disability, sixty-five per cent of the weekly loss in wages during the period of such partial disability.

(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivisions (a) and (b), respectively.

(d) Said subdivisions (a), (b), and (c) shall be subject to the following limitations:

Aggregate disability indemnity for injury to a single employee caused by a single accident shall not exceed four times the average annual earnings of such employee.

The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

The weekly indemnity due on the eighth day after the employee leaves work as the result of the injury may be withheld until the twenty-ninth day after he so leaves work; if recovery from the disability shall then have

occurred, such first weekly indemnity shall not be recoverable; if the disability still continues, it shall be added to the weekly indemnity due on said twenty-ninth day and be paid therewith.

If the period of disability does not last more than one week from the day the employee leaves work as the result of the injury, no indemnity whatever shall be recoverable.

3. *The death of the injured employee* shall not affect the obligation of the employer under subsections 1 and 2 of this section, so far as his liability shall have become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

(a) In case the deceased employee leaves a person or persons wholly dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of subsection 2 of this section, to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection 1), equal to four times his average annual earnings; the same to be payable, unless and until the board shall direct payment in gross, in weekly installments corresponding in amount to the weekly earnings of the employee.

(b) In case the deceased employee leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of four times such average annual earnings of the employee as the average annual amount devoted by the deceased to the support of the person or persons so partially dependent on him for support bears to such average annual earnings, the same to be payable, unless and until the board shall direct payment in gross, in weekly installments corresponding in amount to the weekly earnings of the employee; provided that the total compensation for the injury and death (exclusive of the benefit provided for in said

subsection 1) shall not exceed four times such average annual earnings.

(c) Liability for the death benefits provided for in subdivisions (a) and (b) respectively shall only exist where the accident is the proximate cause of death; provided that, if the accident proximately causes permanent total disability, and death ensues from some other cause before disability indemnity ceases, the death benefit shall be the same as though the accident had caused death; and provided further that, if the accident proximately causes permanent partial disability and death ensues from some other cause before disability indemnity ceases, liability shall exist for such percentage of the death benefits provided for in said subdivision (a) or (b) (as the case may be), as shall fairly represent the proportionate extent of the impairment of earning capacity caused by such permanent partial disability in the employment in which the employee was working at the time of the accident.

(d) If the deceased employee leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding \$100.

Section 2394-10. I. *The weekly earnings* referred to in section 2394-9 shall be one fifty-second of the average annual earnings of the employee; *average annual earnings* shall not be taken at less than \$375, nor more than \$750, and between said limits shall be arrived at as follows:

(a) If the injured employee has worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed.

(b) If the injured employee has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings



shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.

(d) The fact that an employee has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

2. *The weekly loss in wages* referred to in section 2394-9 shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

3. *The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee:*

(a) A wife upon a husband with whom she is living at the time of his death.

(b) A husband upon a wife with whom he is living at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employee; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof; and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

4. *No person shall be considered a dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.*

5. *Questions as to who shall constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees; provided that in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be recoverable by and payable to his personal representative in gross. No person shall be excluded as a dependent who is a non-resident alien.*

6. No dependent of an injured employee shall be deemed, during the life of such employee, a party in interest to any proceeding by him for the enforcement or collection of any claim for compensation, nor as respects the compromise thereof by such employee.

[*Explanation by author.* From here on substitute words "section 2394—1 to 2394-31 inclusive," for words "this act," as per amendment by Laws 1911, c. 664].

Section 2394—11. No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, *notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf,* shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at his last known place of business or residence. Such mailing shall constitute completed service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required; and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby; and provided further, that if no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred.

Section 2394—12. Wherever in case of injury the right to compensation under this act would exist in favor of any employee, he shall, upon the written request of his employer, submit from time to time to *examination by a regular practicing physician,* who shall be provided

and paid for by the employer, and shall likewise submit to examination from time to time by any regular physician selected by said industrial accident board, or a member or examiner thereof. The employee shall be entitled to have a physician, provided and paid for by himself, present at any such examination. So long as the employee, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof.

Section 2394-13. There is hereby created a board which shall be known as the *industrial accident board*. The commissioner of labor and industrial statistics shall be ex-officio a member of such board. He may, however, authorize the deputy commissioner to act in his place. Within thirty days after the passage of this act, the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve four years. Thereafter two members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board, including the said commissioner, shall re-

ceive an annual salary of \$5,000. This salary shall, as to the commissioner of labor and industrial statistics, be in full for his services as such commissioner of labor and industrial statistics.

Section 2394-14. *The board shall organize by choosing one of its members as chairman. Subject to the provisions of this act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required, such examiners to be exempt from the operation of [sections 990-1 to 990-32, inclusive, of the statute]. It may also appoint a secretary, who shall be similarly exempt, and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed. It shall provide itself with a seal for the authentication of its orders, awards, and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Wisconsin—Seal." It shall keep its office at the capitol, and shall be provided by the superintendent of public property with a suitable room or rooms, necessary office furniture, stationery, and other supplies. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this act shall be audited and paid out of the general funds of the state, the same as other general state expenses are audited and paid.*

Section 2394-15. *Any dispute or controversy concerning compensation under this act, including any in which the state may be a party, shall be submitted to said industrial accident board in the manner and with the effect provided in this act. Every compromise of any claim for compensation under this act shall be subject*

to be reviewed by, and set aside, modified, or confirmed by the board upon application made within one year from the time of such compromise.

Section 2394-16. *Upon the filing with the board by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known postoffice address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings may be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay-roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby, shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the circuit court of any county.*

Section 2394-17. *After final hearing by said board, it shall make and file (1) its findings upon all the facts*

involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the hearing and determination of any controversy before it, the board shall have power to order the payment of such, or any part, of the compensation, which is or may fall due, as to which the party from whom the same is claimed does not deny liability in good faith within ten days after the giving of notice of hearing provided for in the preceding section; and if the same shall not be paid as required by such order, the facts with respect to the liability therefor, and the determination of the board as to the rights of the parties, shall be embraced in, and constitute a part of, its finding and award; and the board shall have the power to include in its award, as a penalty for non-compliance with any such order, not exceeding twenty-five per cent. of each amount which shall not have been paid as directed thereby.

Section 2394-18. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, *render judgment in accordance therewith*; which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

Section 2394-19. *The findings of fact* made by the board acting within its powers shall, in the absence of fraud, be conclusive; and the award, whether judgment has been rendered thereon or not, shall be *subject to review only in the manner and upon the grounds following*: Within twenty days from the date of the award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the board for the review of such award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the board, or any member



of the board, shall be deemed completed service. The board shall serve its answer within twenty days after the service of the complaint, and, within like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the board shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its findings and award. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the board acted without or in excess of its powers.
2. That the award was procured by fraud.
3. That the findings of fact by the board do not support the award.

Section 2394-20. *Upon the setting aside of any award* the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcript of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

Section 2394-21. *Said board, or any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom* within the time and in the manner provided for an appeal from the orders of the circuit court; but all such appeals shall be placed on the calendar of

the supreme court and brought to a hearing in the same manner as state causes on such calendar.

Section 2394-22. *No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies of transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court, but no costs shall be taxed against said board. In any action for the review of an award, and upon any appeal therein to the supreme court, it shall be the duty of the attorney general, personally, or by his assistant, to appear on behalf of the board, whether any other party defendant shall have appeared or be represented in the action or not. Unless previously authorized by the board, no lien shall be allowed, nor any contract be enforceable, for any contingent attorney's fee for the enforcement or collection of any claim for compensation where such contingent fee, inclusive of all taxable attorneys' fees paid or agreed to be paid for the enforcement or collection of such claim, exceeds ten per cent. of the amount at which such claim shall be compromised, or of the amount awarded, adjudged, or collected.*

Section 2394-23. *No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged, or paid, be subject to be taken for the debts of the party entitled thereto.*

Section 2394-24. *The whole claim for compensation for the injury or death of any employee or any award or judgment thereon, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted, but this section shall not impair the lien of judgment entered upon any award.*

Section 2394-25. *The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the em-*

ployee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

Section 2394-26. *Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employees, or otherwise, for the payment to such employees, their families, dependents, or representatives, of sick, accident, or death benefits in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution, or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may, in whole or in part, have insured the liability for such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employee, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them.*

Section 2394-27. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof incon-

sistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law. For the purposes of this act, each employee shall constitute a separate risk within the meaning of section 1898d of the statutes.

Section 2394-28. *Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:*

1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at three per centum per annum, with such trust company of this state as shall be designated by the employee (or by his dependents, in case of his death, and such liability exists in their favor), or in default of such designation by him (or them) after ten days' notice in writing from the employer, with such trust company of this state as shall be designated by the board; or

2. *By the purchase of an annuity*, within the limitations provided by law, in any insurance company granting annuities and licensed in this state, which may be designated by the employee, or his dependents, or the board, as provided in subsection 1 of this section.

Section 2394-29. The board shall cause to be printed and furnished free of charge to any employer or employee such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of such election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon

the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employees, by posting such notice thereof in several conspicuous places in the office, shop, or place of business of the employer, or by publishing or in such other manner as the board shall deem most effective; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employees.

Section 2394-30. A sum sufficient to carry out the provisions of this act is hereby appropriated out of any money in the treasury not otherwise appropriated.

Section 3. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed

Section 2394-31. The legislature intends the contingency in subdivision 2 of section 2394-1 of this act to be a separable part [of said section] and the subdivision likewise separable from the rest of the act, and that part of said section 2394-1 that follows subdivision 2, likewise separable from the rest of the act; so that any part of said subdivision, or the whole, or that part which follows said subdivision 2, may fail without affecting any other part of the act.

SECTION 2. Sections 2394-3 to 2394-32, inclusive, shall take effect and be in force from and after the passage and publication of this act, and the entire act shall be in force from and after September 1st, 1911.

**§ 878. Nevada statute (Laws 1911, c. 183.)**

An Act determining certain employments and industries to be especially dangerous, establishing a system of compensation for accidents to workmen engaged therein, requiring employers or contractors carrying on such industries to pay compensation, entitling injured work-

men or their legal representative to receive such compensation, fixing the amount of same and the manner of payment, fixing the time within which claims for compensation must be made, prescribing the manner and method of giving notice to such owner or contractor of such accident, providing for the manner of settling disputed claims by arbitration, providing for their final determination by courts of justice, and granting to courts of justice certain additional powers in proceedings under this act, determining what persons shall be liable under this act.

Sec. 1. If in any employment to which this act applies personal injury disabling a workman from his regular services for more than ten days, or death by accident, arising out of and in the course of employment is caused to a workman, the workman so injured, or in case of death, a member of his family, as hereinafter defined, shall be entitled to receive from his employer, and the said employer shall be liable to pay, the compensation provided for in this act; provided, that recovery hereunder shall not be barred where such employee may have been guilty of *contributory negligence* where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense: (1) *That the employee either expressly or impliedly assumed the risk of the hazard complained of;* (2) *That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.* No contract, rule or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

Sec. 2. "Employer" includes any body of persons corporate or incorporate and the legal personal repre-

representative of a deceased employer. "*Workman*" includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and where his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom compensation is payable. "*Dependents*" means wife, father, mother, husband, sister, brother, child or grandchild; provided, that they are wholly or partially dependent upon the earnings of the workman at the time of his death.

Sec. 3. *This act shall apply to workmen engaged in manual or mechanical labor in the following employments within this state, each of which is hereby determined to be especially dangerous, in which from the nature, condition or means of prosecution of the work therein, extraordinary risks to life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.*

(a) The erection or demolition of any bridge or building in which there is, or in which the plans or specifications require iron or steel frame work;

(b) The operation of elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of material in connection with the erection or demolition of such bridge or building;

(c) Work on scaffolds of any kind elevated twenty feet or more above the ground, water or floor beneath, in the erection, construction, painting, alteration or repair of buildings, bridges or structures;

(d) Construction, operation, alteration, or repair of wires, cables, switch boards or apparatus charged with electric currents;



(e) The operation on railroads of locomotives, engines, trains, motors or cars propelled by gravity, steam, electricity or other mechanical power, or the construction or repairs of railroad tracks and road beds over which such locomotives, engines, trains, motors, or cars are operated;

(f) Construction, operation, alteration or repairs of locomotives, engines, trains, motors or cars in or about the shops, roundhouses, or other places where the same is done;

(g) Construction, operation, alteration, or repairs to mills, smelters or mines, including every shaft or pit in the course of being sunk, and every cross-cut, drift station, winze, level or inclined plane through which workmen pass to and from work, and all works, machinery, tramways, ladders or passages, both below ground and above ground, in and adjacent to any mine;

(h) All work necessitating dangerous proximity to gun powder, blasting powder, dynamite or other explosives, where the same are used as instrumentalities of the industry;

(i) The construction of tunnels.

The employers to whom this act shall apply shall be any person or persons, association, partnership or corporation carrying on any such industry as aforesaid.

Sec. 4. *Notice of accidents must be given* to the employer as soon as practicable after the happening thereof, and the claim for compensation with respect to such accident within six months from the occurrence of such accident causing the injury, or in case of death, within six months from the time of death; *provided, always*, that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defense by the want, defect or inaccuracy, and that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause. Notice in respect of an injury under this act shall give the name and address of the person

injured, and shall state in ordinary language the cause of the injury, if known, the date on which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such of employers. The notice may be served by delivering the same to or at the residence or place of business of the person upon whom it is to be served, or notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in providing the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered. Where the employer is a body of persons, natural or artificial, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body.

Sec. 5. *The amount of compensation in case death results from injury, or for death accruing within five years as a result of injury, shall be:*

(a) If the workman leave any person or persons who at the time of the accident were wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of two thousand dollars, whichever of these sums is the greater, but not exceeding in any case three thousand dollars; provided, that the total sum of any weekly payments made under this act shall be deducted from such sum; and if the period of the workman's employment by the same employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be nine hundred and thirty-six times his average daily earnings during the period of his actual employment under the same employer;

(b) If the workman leave only person or persons who at the time of the accident were partially dependent upon his earnings, a sum of fifty per cent. of the amount payable under the foregoing provision of this act;

(c) If the workman leave no person at the time of the accident who was dependent upon his earnings the reasonable expenses of his medical attendance and burial, not exceeding in all three hundred dollars.

Whatever sum is payable under this section in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, and if he leave no such dependents, then to the public administrator, or the benefit of the person or persons to whom the expenses of medical attendance and burial are due.

Sec. 6. *The amount of compensation in case of total or partial disability* resulting from injury shall be:

(a) A weekly payment during the disability, beginning within ten days after the injury, 60 per cent. of his average weekly earnings in such employment during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employ of the same employer, so long is there is complete disability; and that proportion of the said percentage which the depleted earning capacity for that service bears to the total disability when the injury is only partial, but in no event shall the total of all payments under this act exceed the sum of three thousand dollars;

(b) In addition to the foregoing payments, if the injured person lose both feet or both hands, or one foot and one hand, or both eyes, or one eye and one foot or one hand, he shall receive, during a full period of five years, 40 per cent. of his average weekly earnings, or if he lose one foot, one hand or one eye, the additional compensation therefor shall be 15 per cent. of his average weekly earnings, the amount of such earnings to be computed in the same manner as the foregoing 60 per cent.; provided, that in no case shall all the payments received

therein exceed in any month the whole wages earned when the injury occurs, nor shall the added percentages continue longer than to make all payments aggregate three thousand dollars.

Sec. 7. Any workman entitled to receive weekly payments under this act, is required, if requested by the employer, *to submit himself for examination* by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. A copy of the report of the examining physician shall be furnished to the workman. If a dispute then exists as to the workman's condition or amount of weekly compensation such dispute shall be determined by arbitration under this act, or by judicial procedure as hereinafter provided; provided, also, that any and all disputes arising under this act may be first submitted to a board of arbitration, and in case of failure to settle it, resort may be had to courts of justice.

Sec. 8. *Arbitration proceedings* shall be as follows: the employer and the workman may each choose one arbitrator, the two arbitrators thus chosen shall choose the third, and the three arbitrators shall hear the facts of the dispute within three months after having been chosen, and within two weeks thereafter, render a decision, which, if unanimous, shall be final and binding on both parties.

Sec. 9. On failure of the board of arbitration to reach an adjustment of the dispute above referred to, either party may apply to a court of competent jurisdiction, and have an adjudication as in any other controversy. And the findings and judgment of the court shall be conclusive on all parties concerned. Said courts may compel the attendance of witnesses and the production of evidence, as in all other cases provided for by law, and the judgment of said court may continue and diminish or increase the weekly payments, subject to the maximum provided in this act. The prevailing party

in any action, brought under the provisions of this act, shall be entitled to his costs of suit and reasonable attorney's fees; provided, that nothing in this act shall operate to defeat the constitutional right of appeal.

Sec. 10. If any employer who shall be the principal, enters into a contract with an *independent contractor* to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, the said principal shall be liable to pay to any workman employed in the execution of the work, any compensation under this act, which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, then reference to the principal shall be substituted for reference to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workman under the contractor or employer by whom he is immediately employed. Where such principal is liable to pay compensation he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from receiving compensation under this act, from the contractor or subcontractor, instead of the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on or in or about the premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

Sec. 11. *Nothing in this act contained shall be held or deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for the death or accidental injury.* But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation of damages

for or on account of such death or injury. *The right of election or choice of remedies shall be exercised solely by such workman or his representatives.*

Sec. 12. A claim for compensation for the injury or death of any employee or any reward or judgment entered thereon shall be entitled to a *preference over the other debts of the employer* if and to the same extent as the wages of such employee shall be so preferred, but this section shall not impair the lien of any judgment entered upon any award.

Sec. 13. The making of a lawful claim against any employer for compensation under this act for the injury or death of his employee shall *operate as an assignment of any assignable cause of action* in tort which the employee or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party.

Sec. 14. Nothing in this act contained shall be construed as impairing the rights of parties interested after the injury or death of any employee *to compromise or settle upon such terms as they may agree upon* any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employee any interest which he may not divert by such settlement or for which he or his estate shall in the event of such settlement by him be accountable to such dependents or any of them.

Sec. 15. This act shall take effect July 1st, 1911.

§ 879. Illinois statute. (Laws 1911, p. 314.)

AN ACT *to promote the general welfare of the People of this State, by providing compensation for accidental injuries or death suffered in the course of employment.*

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly: That any employer covered by the provisions of this Act in this State may elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions*

of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employee who has elected to accept the provisions of this Act, according to the provisions of this Act he shall not escape liability for injuries sustained by such employee arising out of and in the course of his employment because

1. The employee assumed the risks of the employer's business.

2. The injury or death was caused in whole or in part by the negligence of a fellow servant.

3. The injury or death was proximately caused by the contributory negligence of the employee, but such contributory negligence shall be considered by the jury in reducing the amount of damages.

a. Every such employer is presumed to have elected to provide and pay the compensation according to the provisions of this Act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

b. Every employer within the provisions of this Act failing to file such notice shall be bound hereby as to all his employees who shall elect to come within the provisions of this Act until January 1st of the next succeeding year and for terms of each year thereafter: *Provided*, any such employer may elect to discontinue the payments of compensation herein provided only at the expiration of any such calendar year, by filing notice of his intention to discontinue such payments, with the State Bureau of Labor Statistics, at least sixty days prior to the expiration of any such calendar year, and by posting such notice in the plant, shop, office or place of work, or by personal service, in written or printed form, upon such employee, at least sixty days prior to the expiration of any such calendar year.

c. In the event any employer elects to provide and pay compensation provided in this Act, then every employee of such employer, as a part of his contract of hiring or



who may be employed at the time of the taking effect of this Act and the acceptance of its provisions by the employer, *shall be deemed to have accepted all the provisions of this Act and shall be bound thereby unless within thirty days after such hiring and after the taking effect of this Act, he shall file a notice to the contrary* with the secretary of the State Bureau of Labor Statistics, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any of his common law or statutory defenses, and until such notice to the contrary is given to the employer, the measure of liability of the employer for any injury shall be determined according to the compensation provisions of this Act: *Provided, however, that before any such employee shall be bound by the provisions of this Act, his employer shall either furnish to such employee personally at the time of his hiring, or post in a conspicuous place at the plant or in the room or place where such employee is to be employed, a legible statement of the compensation provisions of this Act.*

Sec. 2. *The provisions of this Act shall apply to every employer in the State engaged in the building, maintaining or demolishing of any structure; in any construction or electrical work; in the business of carriage by land or water and loading and unloading in connection therewith (except as to carriers who shall be construed to be excluded herefrom by the laws of the United States relating to liability to their employees for personal injuries while engaged in interstate commerce where such laws are held to be exclusive of all State regulations providing compensation for accidental injuries or death suffered in the course of employment); in operating general or terminal store-houses; in mining, surface mining, or quarrying; in any enterprise, or branch thereof, in which explosive materials are manufactured, handled or used in dangerous quantities; in any enterprise wherein molten metal or injurious gases or vapors or inflammable fluids are manufactured, used, generated, stored or conveyed in dangerous quantities; and in any enterprise in*

which statutory regulations are now or shall hereafter be imposed for the guarding, using or the placing of machinery or appliances, or for the protection and safeguarding of the employees therein, each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions and means of prosecution of the work therein, extraordinary risks to life and limb of the employee engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to the employees therein.

Sec. 3. *No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this Act or to any one wholly or partially dependent upon him or legally responsible for his estate: Provided, that when the injury to the employee was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof.*

Sec. 4. *The amount of compensation which the employer who accepts the provisions of this Act shall pay for injury to the employee which results in death, shall be:*

a. *If the employee leaves any widow, child or children, or parents or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employee, but not less in any event than one thousand five hundred dollars, and not more in any event than three thousand five hundred dollars. Any weekly payments, other than necessary medical or surgical fees, shall be deducted in ascertaining such amount payable on death.*

b. If the employee leaves collateral heirs dependent upon his earnings, such a percentage of the sum provided in section "a" as the contributions which deceased made to the support of these dependents, bore to his earnings.

c. If the employee leaves no widow or child or children, parents or lineal or collateral heirs dependent upon his earnings, a sum not to exceed one hundred and fifty dollars for burial expenses.

d. All compensation provided for in this section to be paid in case injury results in death, shall be paid in installments equal to one-half the average earnings, at the same intervals at which the wages or earnings of the employee were paid while he was living; or if this shall not be feasible, then the installments shall be paid weekly.

e. The compensation to be paid for injuries which result in death, as provided for in this section, shall be paid to the personal representative of the deceased employee and shall be distributed by such personal representative to the beneficiaries entitled thereto, in accordance with the laws of this State relating to the descent and distribution of personal property.

Sec. 5. *The amount of compensation which the employer who accepts the provisions of this Act shall provide and pay for injury to the employee resulting in disability shall be:*

a. Necessary first aid, medical, surgical and hospital services, also medicine and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200.00, also necessary services of a physician or surgeon during such period of disability, unless such employee elects to secure his own physician or surgeon.

b. If the period of disability lasts for more than six working days, and such fact is determined by the physician or physicians, as provided in section 9, compensation equal to one-half of the earnings, but not less than \$5.00 nor more than \$12.00 per week, beginning on the eighth day of disability, and as long as the disability lasts, or until

the amount of compensation paid equals the amount payable as a death benefit.

c. If any employee, by reason of any accident arising out of and in the course of his employment, receive any serious and permanent disfigurement to the hands or face, but which injury does not actually incapacitate the employee from pursuing his usual or customary employment so that it is possible to measure compensation in accordance with the scale of compensation and the methods of computing the same herein provided, such employee shall have the right to resort to the arbitration provisions of this Act for the purpose of determining a reasonable amount of compensation to be paid to such employee, but not to exceed one-quarter ( $\frac{1}{4}$ ) the amount of his compensation in case of death.

d. If after the injury has been received it shall appear upon medical examination as provided for in section 9, that the employee has been partially, though permanently incapacitated from pursuing his usual and customary line of employment, he shall receive compensation equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning, or is able to earn in some suitable employment or business after the accident, if such employment is secured.

e. In the case of complete disability which renders the employee wholly and permanently incapable of work, compensation for the first eight years after the day the injury was received, equal to 50 per cent of his earnings, but not less than \$5.00 nor more than \$12.00 per week. If complete disability continues after the payment of a sum equal to the amount of the death benefit or after the expiration of the eight years, then a compensation during life, equal to 8 per cent of the death benefit which would have been payable had the accident resulted in death. Such compensation shall not be less than \$10.00 per month and shall be payable monthly.

(1) In case death occurs before the total of the payments made equals the amount payable as a death benefit,

as provided in section 4, article *a*, then in case the employee leaves any widow, child or children, or parents, or other lineal heirs, they shall be paid the difference between the compensation for death and the sum of such payment, but in no case shall this sum be less than \$500.00.

(2) In cases of complete disability, after compensation has been paid at the specified rate for a term of at least six months, the employee shall have the privilege of filing a petition in accordance with article *d* of section 4 of this Act, asking for a lump sum payment of the difference between the sum of the payments received and the compensation to which he was entitled when such permanent disability has been definitely determined. For the purpose of this section, blindness or the total irrecoverable loss of sight, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent paralysis of the legs or arms, and a fracture of the skull resulting in incurable imbecility or insanity, shall be considered complete and permanent disability: *Provided*, these specific cases of complete disability shall not, however, be construed as excluding other cases.

(3) In fixing the amount of the disability payments, regard shall be had to any payments, allowance or benefit which the employee may have received from the employer during the period of his incapacity, except the expenses of necessary medical or surgical treatment. In no event, except in cases of complete disability as defined above, shall any weekly payment payable under the compensation plan in this section provided exceed \$12.00 per week, or extend over a period of more than eight years from the date of the accident. In case an injured employee shall be incompetent at the time when any right or privilege accrues to him under the provisions of this Act, a conservator or guardian of the incompetent, appointed pursuant to law, may on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the employee himself had been

competent and had claimed or exercised said right or privilege; and no limitations of time by this Act provided, shall run so long as said incompetent employee had no conservator or guardian.

Sec. 5½. Any person entitled to compensation under this Act, or any employer who shall be bound to pay compensation under this Act, who shall desire to have such compensation, or any part thereof, *paid in a lump sum*, may petition any court of competent jurisdiction of the county in which the employee resided or worked at the time of disability or death, asking that such compensation be so paid, and if upon proper notice to the interested parties, and a proper showing made before such court, it appears to the best interest of the parties that such compensation be so paid, the court shall order payment of a lump sum, and where necessary, upon proper application being made, a guardian, conservator or administrator, as the case may be, shall be appointed for any person under disability who may be entitled to any such compensation, and an employer bound by the terms of this Act, and liable to pay such compensation, may petition for such appointment where no such legal representatives have been appointed or acting for such party or parties so under disability.

Sec. 6. *The basis for computing the compensation* provided for in sections 4 and 5 of the Act shall be as follows:

a. The compensation shall be computed on the basis of the *annual earnings* which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

b. Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

c. The annual earnings if not otherwise determinable shall be regarded as 300 times the average daily earnings in such computation.

*d.* If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average on those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

*e.* In the case of injured employees who earn either no wage or less than three hundred times the usual daily wage or earnings of the adult day laborers in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wage.

*f.* As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used for the basis of the year's work shall be not less than two hundred.

*g.* Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment.

*h.* In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this Act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.



Sec. 7. The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this Act, and it shall not be in any way reduced by *contributions from employees*.

Sec. 8. If it is proved that the *injury to the employee resulted from his deliberate intention to cause such injury*, no compensation with respect to that injury shall be allowed.

Sec. 9. Any employee entitled to receive disability payments shall be required if requested by the employer to submit himself for *examination at the expense of the employer to a duly qualified medical practitioner or surgeon selected by the employer*, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examinations shall be for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of adjusting the compensation which may be due the employee from time to time for disability according to the provisions of sections 4 and 5 of this Act: *Provided, however*, that such examination shall be made in the presence of a duly qualified medical practitioner or surgeon provided and paid for by the employee, if such employee so desires, and in the event of a disagreement between said medical practitioners or surgeons as to the nature, extent or probable duration of said injury or disability, they may agree upon a third medical practitioner or surgeon, and, failing to agree upon such third medical practitioner or surgeon, the judge of the county court of the county where the employee resided or was employed at the time of the injury, shall within six days after petition filed in such court for that purpose, select a third medical practitioner or surgeon and the majority report of such three physicians as to the nature, extent and probable duration of such injury or disability shall

be used for the purpose of estimating the amount of compensation payable under this Act. *If the employee refuses so to submit himself to examination or unnecessarily obstructs the same*, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act during such period.

Sec. 10. *Any question of law or fact arising in regard to the application of this law in determining the compensation payable hereunder shall be determined either by agreement of the parties or by arbitration as herein provided.* In case any such question arises which cannot be settled by agreement, the employee and the employer shall each select a disinterested party and the judge of the county court, or other court of competent jurisdiction, of the county where the injured employee resided or worked at the time of the injury, shall appoint a third disinterested party, such persons to constitute a *board of arbitrators* for the purpose of hearing and determining all such disputed questions of law or fact arising in regard to the application of this law in determining the compensation payable hereunder; and it shall be the duty of both employee and employer to submit to such board of arbitrators not later than ten days after the selection and appointment of such arbitrators all facts or evidence which may be in their possession or under their control, relating to the questions to be determined by said arbitrators; and said board of arbitrators shall hear all the evidence submitted by both parties and they shall have *access to any books, papers or records* of either the employer or the employee showing any facts which may be material to the questions before them, and they shall be *empowered to visit the place or plant where the accident occurred*, to direct the injured employee to be examined by a regular practicing physician or surgeon, and to do all other acts reasonably necessary for a proper investigation of all matters in dispute. *A copy of the report of the arbitrators in each case shall be prepared and filed by them with the State Bureau of Labor Statistics, and shall be binding*

upon both the employer and employee except for fraud and mistake: *Provided*, that either party to such arbitration shall have the *right to appeal* from such report or award of the arbitrators *to the circuit court* or the court that appointed the third arbitrator of the county where the injury occurred by filing a petition in such court within twenty days after the filing of the report of the arbitrators, and upon filing a good and sufficient bond, in the discretion of the court, and *upon such appeal the questions in dispute shall be heard de novo*, and either party may have a jury upon filing a written demand therefor with his petition.

Sec. 11. Any person entitled to payment under the compensation provisions of this Act from any employer shall have the same *preferential claim* therefor against the property of the employer as is now allowed by law for a claim by such person against such employer for unpaid wages or for personal services, such preference to prevail against wage claims of all other employees, not entitled to compensation for injuries, and the payments due under such compensation provisions shall *not be subject to attachment, levy, execution, garnishment or satisfaction of debts*, except to the same extent and in the same manner as wages or earnings for personal service are now subject to attachment, levy, execution, garnishment or satisfaction of debts, under the laws of this State, and shall not be assignable. *Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto*, subject to the provisions of this Act relative to compensation for death received in the course of employment. *No claim of any attorney at law* for services in securing a recovery under this Act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record, which approval may be made in term time or vacation.

Sec. 12. *Any contract or agreement* made by any employer or his agent or attorney with any employee or any other beneficiary of any claim under the provisions

of this Act *within seven days after the injury shall be presumed to be fraudulent.*

Sec. 13. No employee or beneficiary shall have power to *waive* any of the provisions of this Act in regard to the amount of compensation which may be payable to such employee or beneficiary hereunder.

Sec. 14. No proceedings for compensation under this Act shall be maintained unless *notice of the accident* has been given to the employer as soon as practicable after the happening thereof, and during such disability, and unless *claim for compensation has been made within six months after the injury*, except that in case of an accident resulting in temporary disability, notice of such accident must be given to the employer within thirty days after said accident; or in case of the death of the employee or in the event of his incapacity, within six months after such death or incapacity, or in the event that payments have been made under the provisions of this Act, within six months after such payments have ceased. No want or defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employee, unless the employer proves that he is unduly prejudiced in such proceedings by such want, defect or inaccuracy. Notice of the accident shall, in substance apprise the employer of the claim of compensation made shall state the name and address of the employee injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: *Provided*, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer or his agent, supervising work in which such employee was engaged at the time of the injury.

Sec. 15. This Act shall not *affect or disturb the continuance of any existing insurance, mutual aid, benefit,*

*or relief association or department*, whether maintained in whole or in part by the employer or whether maintained by the employees, the payment of benefits of such association or department being guaranteed by the employer or by some person, firm or corporation for him: *Provided*, the employer contributes to such association or department an amount sufficient to insure the employees or other beneficiary the full compensation herein provided, exclusive of the cost of the maintenance of such association or department without any expense to the employee. This Act shall not prevent the organization and maintaining under the insurance law of this State of any benefit or insurance company for the purpose of insuring against the compensation provided for in this Act, the expense of which is maintained by the employer. This Act shall not prevent the organization or maintaining under the insurance laws of this State of any voluntary mutual aid, benefit or relief association among employees for the payment of additional accident or sick benefits.

No existing insurance, mutual aid, benefit or relief association or department shall, by reason of anything herein contained, be authorized to discontinue its operation without first discharging its obligations to any and all persons carrying insurance in the same or entitled to relief or benefits therein.

Any contract of employment, relief benefit, or insurance or other device whereby the employee is required to pay any premium or premiums for insurance against the compensation provided for in this Act shall be null and void, and any employer withholding from the wages of any employee any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine of not less than ten dollars nor more than twenty-five dollars in each offense in the discretion of the court.

Sec. 16. Any person who shall become entitled to compensation under the provisions of this Act, shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be

*subrogated* to all the rights of such employer against any insurance company or association which may have insured such employer against loss growing out of the compensation required by the provisions of this Act to be paid by such employer, and in such case only, a payment of the compensation that has accrued to the person entitled thereto in accordance with the provisions of this Act, shall relieve such insurance company from such liability.

Sec. 17. *Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:*

a. The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this Act shall be reduced by the amount of damages recovered.

b. If the employee or beneficiary has recovered compensation under this Act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under sections 4 and 5 of this Act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor.

Sec. 18. *An agreement or award may, at any time after six months, and before eighteen months, from the date of filing, be reviewed, upon the application of either party, on the ground that the incapacity of the employee has subsequently increased or diminished. Such application shall be made to any court of competent jurisdiction; and unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the employee and report upon his condition; and upon his report, and after hearing all the evidence the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided.*

Sec. 19. It shall be the duty of every employer within the provisions of this Act to send to the secretary of the State Bureau of Labor Statistics in writing an immediate *report of all accidents or injuries arising out of or in the course of the employment and resulting in death*; it shall also be the duty of every such employer to report between the 15th and the 25th of each month to the secretary of the State Bureau of Labor Statistics all accidents or injuries for which compensation has been paid under this Act, which accidents or injuries entail a loss to the employee of more than one week's time, and in case the injury results in permanent disability, such report shall be made as soon as it is determined that such permanent disability has resulted or will result from such injury. All such reports shall state the date of the injury, including the time of day or night, the nature of the employer's business, the age, sex, conjugal condition of the injured person, the specific occupation of the injured person, the direct cause of the injury and the nature of the accident, the nature of the injury, the length of disability and, in case of death, the length of disability before death, the wages of the injured person, whether compensation has been paid to the injured person, or to his legal representative or his heirs or next of kin, the amount of compensation paid, the amount paid for physicians', surgeons' and hospital bills, and by whom paid, and the amount paid for funeral or burial expenses, if known. The making of reports as provided herein shall release the employer covered by the provisions of this Act from making such reports to any other officer of the State.

Sec. 20. Any person, firm or corporation who undertakes to do or contracts with others to do, or have done for him, them or it, any work embraced in section 2 of this Act, requiring such dangerous employment of employees in, or about premises where he, they or it, as principal or principals, contract to do such work or any part thereof, and does not require that the compensation provided for in this Act shall be insured to the employee or beneficiary by any such person, firm or cor-



poration undertaking to do such work and any such person, firm or corporation who creates or carries into operation any fraudulent scheme, artifice or device to enable him, them or it to execute such work without such person, firm or corporation being responsible to the employee or beneficiaries entitled to such compensation under the provisions of this Act, such person, firm or corporation shall be included in the term "employer" and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for, and be subject to all the provisions of this Act.

Sec. 21. *The term "employee" as used in this Act shall be held to include only such persons as may be exposed to the necessary hazards of carrying on any employment or enterprise referred to in section 2 of this Act. Persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employers' trade or business, are not included in the foregoing definition.*

Sec. 22. *Section 21 shall not be construed to include any employee engaged in any work of an incidental character unconnected with the dangers necessarily involved in carrying on any employment or enterprise referred to in section 2, or in any work of a clerical or administrative nature which does not expose the employee to the inherent hazards of any such employment or enterprise.*

#### PENALTIES.

Sec. 23. Any wilful neglect, refusal, or failure to do the things required to be done by any section, clause, or provision of this Act, on the part of the persons herein required to do them, or any violation of any of the provisions or requirements hereof, or any attempt to obstruct or interfere with any court officer, member of an arbitration board herein provided for, or with the secretary of the Bureau of Labor Statistics or his deputy, in the discharge of the duties herein imposed upon any of them, or any refusal to comply with the terms of this Act,

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shall be deemed a *misdemeanor*, punishable by a fine of not less than \$10.00 nor more than \$500, at the discretion of the court.

Sec. 23½. The right of action for damages caused by any such injury, at common law or other statute in force prior to the taking effect hereof shall not be affected by this Act and every existing right of action for negligence or to recover damages for injury resulting in death, is continued and nothing in this Act shall be construed as limiting the right of such action so accrued before the taking effect of this Act.

Sec. 24. The invalidity of any portion of this Act shall in no way affect the validity of any other portion thereof which can be given effect without such invalid part.

Sec. 25. This Act shall take effect and be in force on and after the *1st day of May, 1912*.

APPROVED June 10, 1911.

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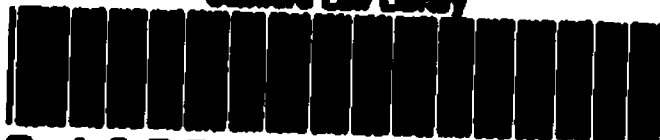








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